Methodological consistency in the interpretation of international treaties in investor-State arbitration – An empirical study

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I Introduction

International investment treaties[1] often do not include rules on interpretation, leaving investor-state tribunals to their own devices to apply an interpretation process that is capable of settling the dispute between the parties but, importantly, also one that is lawful and legitimate. The interpretation and application of treaty obligations "can have far reaching implications" for the way that a tribunal deals with the dispute before it[2]. While the interpretation process by arbitrators raises countless questions for the study of international investment law, the particular concern of this paper is the extent to which investor-state arbitral tribunals rely on the rules and process of interpretation under customary international law. Such customary rules may contribute to the legitimacy of the interpretation process and thereby, international investment law as a whole. This legitimacy argument advances two separate but related issues: coherence of the subject-matter of international law as a whole and coherence of the methods of treaty interpretation.

The focus of this paper is the *method(s)* of treaty interpretation by investor-state tribunals when presented with interpretive issues of international treaties. The Vienna Convention on the Law of Treaties[3] plays a prominent role in answering how tribunals interpret international treaties[4]. How the tribunals follow these rules will be a significant issue in the tribunals' contribution to the development of the methods of international law (if indeed there is such a method)[5]. Through an empirical study of interpretation, the paper explores how the interpretation choices relate to the broader international legal order, asking whether investor-state tribunals contribute to a harmonious development of international law through interpretation, both within the investment regime itself and compared to other international courts and tribunals. In this way, the paper is structured in two parts: an internal and external view of coherence.

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[1] This includes bilateral investment treaties, multilateral investment treaties and treaties with investment provisions, such as free trade agreements.

[2] N Jansen Calamita, 'Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation' (2010) 42 Georgetown Journal of International Law 233, 279, referring to the Oil Platforms case; *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment* [2003] ICJ Reports 161.

[3] Vienna Convention on the Law of Treaties (concluded on 23 May 1969), 1155 UNTS 331 (hereinafter, the Vienna Convention).

[4] Christoph H Schreuer, 'Diversity And Harmonization Of Treaty Interpretation In Investment Arbitration' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Brill Nijhoff 2010).

[5] See, for example, Koskenniemi who discusses the indeterminacy of treaty interpretation and the tension between evaluative arguments and objectiveness: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 338 ff; or, Pauwelyn and Elsig who discuss the varying degree of interpretation space within which tribunals can select between different interpretative techniques: Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals' in Jeffrey L Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012).

Nevertheless, such a focus on consistency of method does not necessarily lead to consistency in interpretation outcomes or in the ultimate resolution of the dispute[6]. Nor is such consistency in outcome always desirable in investor-state dispute settlement since any such harmonisation of investment law must be balanced against the specific wording of the treaties. Consequently, the paper argues that a more consistent method of treaty interpretation based on the Vienna Convention, which necessarily takes into account different language between treaties, would contribute to the legitimacy of the international investment system, through increasing predictability and transparency of investor-state tribunal reasoning[7]. Yet, the empirical and doctrinal analysis in this paper indicates that tribunals are not even following the first step in a predictable and transparent process of legal reasoning as there is no coherent "method" of treaty interpretation in investor-state dispute settlement.

1 Outline of paper

The paper is divided into three Chapters, all addressing the question of coherence, albeit through different perspectives. Chapter II addresses theoretical questions of interpretation, both in terms of international investment law specifically, as well as the international legal order more broadly. Chapter III addresses an internal view of coherence, the consistency between investor-state tribunals in the application of the customary rules of interpretation in investor-state disputes. The fourth Chapter addresses external coherence between investor-state tribunals and other international courts and tribunals and considers the usage of the principle of systemic integration, as set out in Article 31(3)(c) of the Vienna Convention. Both Chapters III and IV provide empirical results on the prevalence of the rules of the Vienna Convention as a test of coherence of method of treaty interpretation and coherence of both international investment law and the international legal order.

2 Method of empirical study

The paper uses an empirical approach to analysing interpretive arguments of investor-state tribunals. The most important limitation of the empirical work is the basis of jurisdiction of the investor-state disputes, namely the limitation to disputes brought pursuant to investment treaties. In international investment disputes, a number of instruments may confer jurisdiction on the arbitral tribunal, such as the national investment laws of the host State or the investment

[6] As the tribunal in *B-Mex* noted, 'the Tribunal's mandate is to find the terms of the Treaty as they are and to interpret them in accordance with the VCLT. If other tribunals have arrived at a different interpretation of the same provision, that does not change that mandate': *B-Mex, LLC and Others v United Mexican States* (ICSID Case No ARB(AF)/16/3), Partial Award, 19 July 2019 [119]; Further, there is no mechanism for pormoting certainty and predictability under the ICSID system: *Wintershall Aktiengesellschaft v Argentine Republic* (ICSID Case No ARB/04/14), Award, 8 December 2008 [178].

[7] The Working Group on investor-state arbitration reform has noted the need for consistency and coherence as relating to the need for certainty, predictability and equal treatment. See, for example: United Nations Commission on International Trade Law, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters' (United Nations General Assembly 2018) A/CN.9/WG.III/WP.150 para 28.

contract between the host State and the foreign investor[8]. However, the limitation of the study to jurisdiction conferred through an investment treaty is necessary to ensure the dispute is based on international law, pursuant to the terms of the investment treaty between the host state and the home state of the foreign investor. This allows for the comparison of methods in accordance with the Vienna Convention and other international courts and tribunals. However, no limitation has been placed on the forum of the arbitration. The decisions have been drawn from both institutionalised investor-state arbitration, including but not limited to arbitration at the International Centre for the Settlement of Investment Disputes (ICSID)[9], as well as ad-hoc arbitration.

With that limitation in mind, the empirical study employs two methods of data collection. First, the study analyses all decisions[10] of investor-state tribunals in a five-year data set. The large number of publicly available decisions of investor-state tribunals[11] necessitates the limitation of the collection to a smaller data set for the doctrinally-informed empirical study. The years chosen are 1998, 2008 and 2018 to 2020 (up to 31 December 2020), a total of 151 decisions[12]. The five-year data set was selected to represent the more recent methods of treaty interpretation employed in investor-state arbitration (the 2018 to 2020 decisions) combined with two earlier years to indicate any evolution in methods. These three sets of years have been chosen as providing sufficient segregation between investor-state disputes early years (1998), its backlash years (2008) and its reform years (2018 onwards). The second data collection

[8] As at 31 December 2020, 15% of all cases registered with ICSID were brought on the basis of investment contracts, 8% were brought on the basis of a domestic investment law and the remaining disputes were brought on the basis of an investment treaty: 'The ICSID Caseload - Statistics' (International Centre for Settlement of Investment Disputes 2020) Issue 2021-1 11.

[9] Other institutions involved in the resolution of investor-state disputes are the International Chamber of Commerce, London Chamber of International Arbitration, the Permanent Court of Arbitration and the Stockholm Chamber of Commerce.

[10] The reference to "decisions" of these tribunals refers to the awards of investor-state tribunals (both preliminary and final awards) but excludes decisions of Annulment Committees. This is to be distinguished from reference to "cases", referring to the whole dispute between the parties, which may generate multiple reports or awards from the respective tribunals. Fauchald noted a potential weakness in studies limited to decisions in ISDS as it could lead to the over-representation of the approaches of tribunals that split their cases into several decisions. Fauchald argued that ICSID dispute resolution is organized in a way that generally contributes to the likelihood that certain perspectives may be over-represented and such a study may in fact shed some light on the extent to which such over-representation of certain views constitutes a problem for ICSID: Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 European Journal of International Law 301, 355–6 Where appropriate, this study will take into account this potential for over-representation of certain arbitrators or type of disputes.

[11] As at 1 January 2020, there were 1,126 cases based on substantive bilateral investment and free trade agreements: Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' (2020) 21 The Journal of World Investment & Trade 188, 191. As of 1 February 2021, a search conducted on Investor-State Law Guide for decisions, limited to decisions of annulment committees, decisions on jurisdiction or preliminary questions, final awards or partial awards, came back with 962 documents. However, due to the limitations of the search functions in that database, this number does include non-investment treaty decisions which were brought under investment contracts and domestic investment laws.

[12] All publicly available decisions up to 31 December 2020, based on searches conducted on 1 October 2021. The total number includes 4 decisions from 1998, 26 from 2008, 31 from 2018, 48 from 2019 and 42 from 2020.

method more specifically relates to the external view of coherence with the international legal order. As such, free-text searches, subject navigator and article citator tools were employed across two databases[13] to identify all decisions referring to Article 31(3)(c) of the Vienna Convention, or more generally "systemic integration". The results of those searches are discussed in Chapter IV below.

II Theoretical Perspective: Interpretation in International Investment Law

To a large extent, the interpretation of international sources is governed by Articles 31 to 33 of the Vienna Convention[14]. Arguably, since few international investment treaties include

[13] Databases include Investor-State Law Guide (https://www.investorstatelawguide.com/User/Welcome) and JusMundi (https://jusmundi.com/en/coverage).

[14] These provisions are as follows:

Article 31 - General rule of interpretation

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 connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion 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.

Article 32 - Supplementary means of interpretation

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.

Article 33 - Interpretation of treaties authenticated in two or more languages

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.

lex specialis treaty interpretation rules[15], the Vienna Convention interpretation rules are applicable in investor-state disputes as they express customary international law[16]. The following Chapter evaluates this assumption and considers the role of interpretative techniques in international law, their theoretical foundations and practical application to investor-state disputes. The proceeding discussion of interpretation is not a comprehensive account of the many interpretative techniques in international law but rather touches upon some of the primary methods of legal interpretation in accordance with the Vienna Convention.

1 Interpretation in international law

Interpretation, hermeneutically speaking, is the process of giving meaning to a particular text, in the case of international investment law, being investment treaties. However, interpretation in international law today has a greater role than merely a cognitive exercise in clarification of existing norms[17].

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.

[15] A small number of treaties include special rules on treaty interpretation, including rules on binding interpretation by the contracting states and requirement of certain questions to be submitted to the contracting states. For example, the Australia-China Free Trade Agreement states that: 'A joint decision of the Parties, acting through the Committee on Investment, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal of any ongoing or subsequent dispute, and any decision or award issued by such a tribunal must be consistent with that joint decision.' In addition, when the respondent raises certain defences in an investment dispute under the Australia-China Free Trade Agreement, 'the tribunal shall, on the request of the respondent, request the interpretation of the Parties on the issue': Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (Canberra, 17 June 2015), Art 9.18(2) and Article 9.19(1).

[16] the ICJ has referred to Article 31 and 32 as expressing customary international law, see for example *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 38 [94]; the first ICSID Award also noted the 'sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by L'Institut de Droit International in its General Session in 1956, and as codified in Article 31': *Asian Agricultural Products Ltd v Republic of Sri Lanka* (ICSID Case No ARB/87/3), Award, 27 June 1990 [38]; see, further Richard K Gardiner, *Treaty Interpretation* (Second edition, Oxford University Press 2015) 12; August Reinisch, 'The Interpretation of International Investment Agreements' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart Publishing 2015) 373.

[17] The ILC Report on Fragmentation referred to interpretation as 'legal reasoning', rather than merely cognition of the law: Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (International Law Commission 2006) A/CN.4/L.682 para 35; McLachlan referred to the integrating process of legal interpretation: Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279, 286; see the discussion in Jörg Kammerhofer, *International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources* (Cambridge University Press 2021) 80 ff.

A. The power and authority of interpretation

Interpretation can be considered in different senses based on "who" the interpreter is and the weight of that interpretation. Legally binding interpretation must be authorised[18]. Authentic interpretation is usually only undertaken by the treaty parties and has the same binding effect as the formal amendment of treaties[19]. Comparatively, interpretation by tribunals, which is the concern of this study, is at most authoritative interpretation[20], which may be overridden by an authentic interpretation by the contracting parties. Such authoritative interpretation is also not binding on anyone other than the parties to the dispute. Even later tribunals under the same investment treaty are not bound by the interpretation in an earlier decisions since no strict doctrine of precedent exists. However, the interpretive power of tribunals does have "potential doctrinal consequences" for future cases[21].

The process of interpretation provides one of the largest avenues for arbitrators to exercise their creative and discretionary judicial power, enabling the "breathing" of rules in the absence of international legislators[22]. Interpretation thus becomes more than simply a function in the settlement of individual disputes. While the specific weight and authority of judicial decisions is not agreed, the practical reality is that there is a generally accepted role for judicial decisions under international law[23], resulting in at least some acceptance of a *jurisprudence constante*[24] to ensure the consistency and coherence of international dispute settlement[25]. The existence of

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[18] Gardiner (n 16) 11, 109; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 514.

[19] Orakhelashvili (n 18) 515.

[20] ibid 516; Kammerhofer (n 17) 83–4.

[21] *Eskosol S.pA in liquidazione v Italian Republic* (ICSID Case No ARB/15/50), Decision on Respondent's Application Under Rule 41(5), 20 March 2017 [98].

[22] Alain Pellet, 'Canons of Interpretation under the Vienna Convention' in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019) 2.

[23] von Bogdandy and Venzke even go so far as to refer to the effect of judicial precedents being 'concealed' by the doctrinal ordering in Article 38: Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 European Journal of International Law 7, 19.

[24] This doctrine, which can be found in civil law systems, refers to the requirement that a court should give great weight to a rule of law that is accepted and applied in a long line of cases, and should not overrule or modify its own decisions unless clear error is shown and injustice will arise from continuation of a particular rule: Bryan A Garner, *Black's Law Dictionary* (10th ed., Thomson Reuters 2014).

[25] For example, Lauterpacht notes that adherence to legal decisions is 'imperative if the law is to fulfil one of its primary functions, i.e. the maintenance of security and stability': Hersch Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law' (1931) 12 British Year Book of International Law 31, 53; Judge Greenwood emphatically argues for referring to jurisprudence of courts and tribunals: 'International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others. It is a single unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions': *Ahmadou Sadio Diallo (Republic Guinea v Democratic Republic of the Congo), Judgment* [2012] ICJ Reports 324, 8 (Declaration of Judge Greenwood).

customary rules and guides may suggest some limitations on the exercise of the interpretative process. However, the indeterminacy often involved in these rules allows significant scope for arbitrators to decide cases in accordance with their own theoretical or normative preferences[26] and arbitrators may not always be sanctioned for failure to comply with the Vienna Convention if such interpretation is "acceptable"[27].

B. Applicable law and interpretation

Within the context of other works in this series on applicable law in international arbitration, it is necessary to distinguish between the role of applicable law and interpretation in dispute settlement. The distinction between direct applicability and interpretative guidance of external laws and norms is often overlooked, despite the fact that such distinction matters for normative approaches[28] and systemic challenges in international law[29]. Put simply, it is a question of what law are tribunals authorised to interpret (the applicable law) and what law is capable of being used in that interpretation (interpretation of the applicable law): "interpretation, is [the process] of determining the meaning of a rule, while … application, is … that of determining the consequences which the rule attaches to … a given fact"[30]. Interpretation is supposedly a secondary process, only necessary when the meaning of the treaty to be applied is not clear: one cannot apply a law unless its precise meaning is known[31]. However, in practice, the two concepts often collapse into each other[32]. For the purposes of this paper, the primary distinction between application and interpretation is limiting any use of external norms in gap-filling the investment treaty, a process more distinctly a question of applicability. Beyond this, a strict distinction between application and interpretation will not be rigidly employed (nor is it necessary).

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[26] Sean Murphy, 'The Utility and Limits of Canons and Other Interpretative Principles in Public International Law' in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019) 23; Gleider Hernández, 'Interpretative Authority and the International Judiciary' in Andrea Bianchi and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press) 168: 'even the process of identifying legal norms requires a choice as to which theory of sources one privileges, thus further demonstrating how the claim to objectivity in law-identification can be problematic'.

[27] Kammerhofer (n 17) 108.

[28] See discussion in Gardiner (n 16) 27.

[29] Jürgen Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law' in Zachary Douglas, Joost Pauwelyn and Jorge Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford University Press 2014) 280.

[30] *Factory at Chorzów (Germany v Poland), Jurisdiction* [1927] PCIJ Rep Series A No 9 39 Dissenting Opinion of Judge Ehrlich.

[31] J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, vol 1st ed (Oxford University Press 2012) 30; Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press 1961) 365.

[32] Weeramantry (n 31) 30; see also Gardiner (n 16) 27; Kammerhofer (n 17) 85.

2 Interpretation and international investment law

Before turning to the empirical analysis of interpretation in investor-state disputes, it is important to note the theoretical foundations for the application of such interpretation rules in international investment law as well as how such application could benefit the investment law regime.

A. Theoretical application of interpretation rules in investment disputes

The general interpretation rules of international law should apply to the investment regime on the basis that investment law is not a special or self-contained regime,[33] thereby contributing to the coherency in treaty interpretation method in international law. The Vienna Convention contains no reference to the nature of the treaty nor are particular treaty rules generally applicable in investor-state disputes[34]. Some of the characteristics of the investor-state regime do point towards a self-contained regime approach, including the contractual nature of investment treaties, the ad hoc establishment of tribunals (including ICSID tribunals), and that investment disputes primarily concern questions of domestic decision-making[35]. Yet, placing investor-state disputes outside public international law and the rules of treaty interpretation would be a "superficial understanding" of the investor-state dispute settlement system and the nature of its treaty protection, which rather functions as an "integral part of the public international law universe"[36]. While investment law may be more accurately described as a hybrid system given its special characteristics, this does not eliminate the grounding of investment law in treaty protection and its place within the public international legal order[37].

B. Theoretical benefits of interpretation rules in investment disputes

Beyond the function of interpreting the law to determine the individual dispute, the application of interpretation rules may also enhance the internal legitimacy of the investment regime itself. This legitimacy argument can be considered in two ways: first, the potential to unify investment law into a coherent regime of international law and secondly, the legitimacy

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[33] See Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 European Journal of International Law 483; Bruno Simma and Dirk Pulkowski, 'Two Worlds. but Not Apart: International Investment Law and General International Law' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart Publishing 2015).

[34] This can be compared to the European Court of Justice, which is closer to a 'special regime' of treaty interpretation: Eirik Bjorge, 'The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation?' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation* (Cambridge University Press 2015) 507.

[35] Fauchald (n 10) 313.

[36] Jürgen Kurtz, The WTO and International Investment Law: Converging Systems (Cambridge University Press 2016) 2–3.

[37] Roberts argues that ISDS is a 'hybrid' system but is nevertheless a creature of public international law, resulting in the application of many substantive rules developed in public international law being applied directly, rather than by way of analogy: Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45, 50 ff.

of legal reasoning in individual decisions. Starting with the potential to unify investment law into a coherent regime, the provisions of investment treaties often include a high degree of generality and vagueness[38], opening the door wide to interpretation by arbitrators. Interpretation according to the Vienna Convention (or customary international law rules where the Vienna Convention may not apply) enables the unity of investment law as a result of the similarity in language and principles in investment treaties[39]. However, any such harmonisation of international investment must be balanced against the specific wording of the treaties, taking into account that some treaties may intentionally have a wording that does not coincide with the wording of other treaties. The Vienna Convention method will recognise any such differences between treaties since the starting point of the method is the ordinary meaning in the context of the individual treaty itself. Although this optimistic view does require the tribunals to actually follow the Vienna Convention method to provide coherency in investment law and respect the individuality of investment treaties, where necessary.

In relation to the legitimacy of individual dispute reasoning, the Vienna Convention rules can also provide stability and predictability of decisions, similar to the claim by Crawford in relation to the use of the customary rules on state responsibility, "like a drowning man clutching a stick"[40]. The Vienna Convention rules suggest an orderly method of legal reasoning, thereby providing greater likelihood of coherence and integrity of reasoning by ad hoc arbitral tribunals. By following clear interpretation rules:

> *[t]his would allow us to distinguish between arbitral decisions which provide a 'correct' and those which provide an 'incorrect' interpretation (hence meaning) of the words [of the treaty]. It would admit as evidence only those which provide the former – as measured, so it might be argued, on their fealty to the Vienna Convention rules*[41].

Additionally, following the Vienna Convention rules may enable the application of general international law to illuminate the parties' intentions and to understand issues not expressly addressed in the treaty text[42].

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[38] Reinisch (n 16) 373.

[39] Schill promotes a view of multilateralization of international investment law, arguing that the network of investment treaties form "a unitary treaty-overarching legal framework that is based on largely uniform principles of international investment law and arbitration, and whose functions are analogous to a truly multilateral system for investment": Stephan W Schill, 'The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds' (2010) 2 Trade, Law and Development 59, 61; see further Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009). The arguments for and against the multilateralization of investment law are not within the scope of this research; Such a view is shared by some tribunals, for example, the *Berschader v Russia* tribunal considered that international investment case law was a persuasive source of law, even if the respondent was not a party to the ICSID Convention: *Berschader v Russia* (SCC Case No 080/2004), Award, 21 April 2006 [97].

[40] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Review 127, 128.

[41] Kammerhofer (n 17) 69.

[42] Campbell McLachlan, 'Investment Treaties and General International Law' (2008) 57 International and Comparative Law Quarterly 361, 391.

The stability and predictability nurtured by the Vienna Convention method may also be more appropriate than the consistency created by reference to decisions of earlier investor-state tribunals. First, it more adequately fits within a de-centralised international regime, such as investment law[43]. Secondly, it helps to limit the potential for jurisprudential trends influenced by a limited number of actors, as reflected in Arbitrator Stern's criticism of the reliance on prior decisions. In responding to the alleged duty of arbitrators to "contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certain of the rule of law"[44], Arbitrator Stern rather considered it her "duty to decide each case on its own merits, independently of any apparent jurisprudential trend" and did not analyse her role as arbitrator in the same manner as the majority[45]. For Stern, one of the reasons underlying not following "jurisprudential trends" (other than obvious difference in international investment agreements in each dispute) is the ability of such trends to be influenced by only a handful of private actors or arbitrators[46]. Relying on a consistent method of interpretation, rather than consistent outcomes in earlier decisions, could alleviate some of the concerns of problematic jurisprudential trends.

Even so, it would be false to assume that *all* references to the Vienna Convention method of interpretation enhances the stability and predictability of international investment law. There is no "one" answer that results from the application of the Vienna Convention method:

> *Although the Vienna Convention ties the interpretation of international treaties to objective criteria, namely the principle of good faith and recourse to the text, context, and object and purpose of the treaty and, under certain circumstances, its travaux*

[43] See, for example, *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No ARB/08/6), Award, 27 September 2019 [496], in which the tribunal referred to investment law as 'a de-centralised international legal regime in which investment treaties confer jurisdiction over ad hoc tribunals which in turn have jurisdiction only over the parties to the disputes brought before them, and where it is accepted that different tribunals considering similar matters can arrive at different conclusions' as a reason to reject an res judicata effect of the Burlington decision; *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5), Decision on Ecuador's Counterclaims, 7 February 2017.

[44] *Saipem S.pA v The People's Republic of Bangladesh* (ICSID Case No ARB/05/07), Decision on Jurisdiction and Provisional Measures, 21 March 2007 [67]; see also, Kurtz who argues that there is a compelling case for hard consistency like the WTO, but this is a delicate normative balance: Kurtz (n 29); Bungenberg and Titi similar argue that there may be a general development of jurisprudence constante but there should be caution in adopting binding precedent: Marc Bungenberg and Catharine Titi, 'Precedents in International Investment Law' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart Publishing 2015) 1512 ff.

[45] *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5), Decision on Jurisdiction, 2 June 2010 [100].

[46] For example, Stern discusses the precedential weight of the decisions on MFN clauses and jurisdiction, following Maffezini, noting that they only appear balanced because of the repeated involvement of some of the arbitrators: *Impregilo v Argentine Republic (I)* (ICSID Case No ARB/07/17), Award, 21 June 2011 [5] (Concurring and Dissenting Opinion of Professor Stern); see, also the discussion in M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 183 ff.

> *préparatoires, its rules on treaty interpretation are far from always leading the interpreter to only one possible and cogent solution*[47].

While the possibility of multiple "possible and cogent" interpretations may thwart complete consistency in investor-state arbitration, it may still provide transparency in legal reasoning. But, only if, the tribunal is in fact following the Vienna Convention method when it refers to it. This leads to the concern of the next Chapter: the application of the Vienna Convention in empirical context.

III Internal Coherence: Application of Customary Rules of Interpretation in Investment Law

In an empirical analysis of interpretation, it is first uncontroversial to note that investor-state tribunals undertake interpretation of their constitutive treaties:

> *Notwithstanding the Argentine Republic's opinion to the contrary, interpretation is not the exclusive task of States. It is also the duty of tribunals called upon to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty. This is precisely the role of judicial decisions as a source of international law in Article 38(1) of the Statute of the International Court of Justice, to which the Respondent refers*[48].

The focus of the empirical analysis is to consider this interpretative duty in more detail. Based on the foregoing theoretical and general legal background, the review of individual decisions sought to answer the following question: to what extent did the tribunal follow the rules on treaty interpretation set out in the Vienna Convention?

1 Vienna Convention rules of interpretation

The natural starting point for an empirical analysis in treaty interpretation methods is whether investor-state tribunals actually refer to the Vienna Convention. After that initial investigation, a deeper analysis of the application of the general criteria of the Vienna Convention is undertaken in the proceeding sections.

A. References to the Vienna Convention rules

Prior quantitative and qualitative studies of interpretation in investment law identify the prevalence of the rules of the Vienna Convention as the starting point of the interpretative

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[47] *Casinos Austria v Argentina* (ICSID Case No ARB/14/32), Decision on Jurisdiction, 29 June 2018, footnote 185; Similarly, see *B-Mex, LLC and Others v United Mexican States* (n 6) para 119 where the tribunal stated that its 'mandate is to find the terms of the Treaty as they are and to interpret them in accordance with the VCLT. If other tribunals have arrived at a different interpretation of the same provision, that does not change that mandate'.

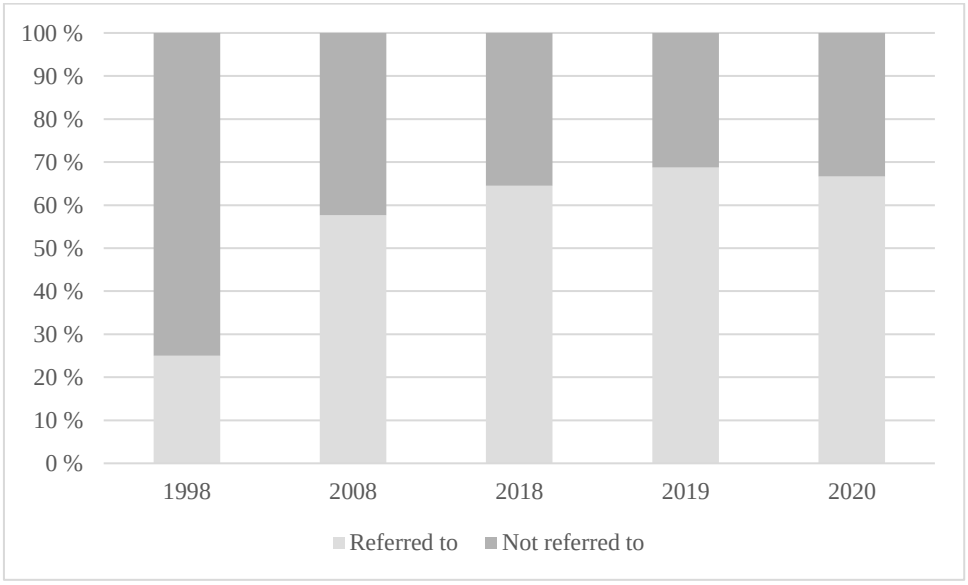
[48] *Sempra v Argentine Republic* (ICSID Case No ARB/02/16), Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010 [147].

exercise by these tribunals[49]. This has also been confirmed by a number of investor-state tribunals, including the first ICSID award under an investment treaty in *AAPL v Sri Lanka*:

> *the first task of the Tribunal is to rule on the controversies existing in this respect by indicating what constitutes the true construction of the Treaty's relevant provisions in conformity with the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by the Institut de Droit International in its General Session in 1956, and as codified in the Article 31 of the Vienna Convention on the Law of Treaties*[50].

A simple search for references to the Vienna Convention interpretation rules in investor-state tribunal decisions confirms the relevance of the Vienna Convention continues to the current-state of investor-state arbitration. Of the total 151 decisions in the empirical study, 97 include references to the Vienna Convention (64.2%), as illustrated in Figure 1. While a majority of decisions, it is certainly not overwhelming. However, it does not take into account the fact that some decisions required limited or no interpretation, for example, quantum awards in which interpretation of the investment treaty had already taken place in the decision on liability.

Figure 1: References to the Vienna Convention, by year



B. Interpretation method and the Vienna Convention

[49] See Schreuer (n 4) 129 ff; Fauchald (n 10) 314; Reinisch (n 16).

[50] *Asian Agricultural Products Ltd. v Republic of Sri Lanka* (n 16) para 38; see also, 'as the Tribunal has observed above and in its Partial Award, NAFTA, as a treaty, is to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which codifies the customary international rules of treaty interpretation': *Methanex Corporation v United States of America* (ad hoc, UNCITRAL), Final Award, 3 August 2005 Part IV, Ch B, para 29.

We need to look beyond the mere references to the Vienna Convention rules in order to see whether there is in fact active use of the rules and methods of interpretation. To test whether the Vienna Convention is merely referred to or whether tribunals were actively applying the Vienna Convention method, the decisions were categorised into five broad "methods" of interpretative approach:

1. Vienna Convention method: the tribunal does appear to step through the Vienna Convention method in a clear and transparent way and/or relies on the Vienna Convention to support its use of other interpretative materials, such as prior jurisprudence or negotiating history. The method employed by the tribunal may not be a "perfect" application of the Vienna Convention but represents legal reasoning where the Vienna Convention has not been used in a merely supportive way or as the tribunal's starting point without being followed properly;

2. Mixed method: the tribunal adopts the Vienna Convention method for some provisions, but then another method of interpretation is used for other provisions of the investment treaty;

3. Supportive argument method: the Vienna Convention is only used in a generally supportive way, or the tribunal "picks and chooses" what parts of the Vienna Convention are helpful to its interpretation;

4. Ordinary meaning method: the tribunal primarily relies on the ordinary meaning of provisions, with some assistance from other interpretative tools, such as context or intention of the parties, but does not rely on (nor otherwise refer to) the Vienna Convention;

5. Prior jurisprudence method: the tribunal relies heavily on earlier case law or the context of other investment treaties; and

6. Unclear method: the tribunal's interpretation method is not clear or transparent.

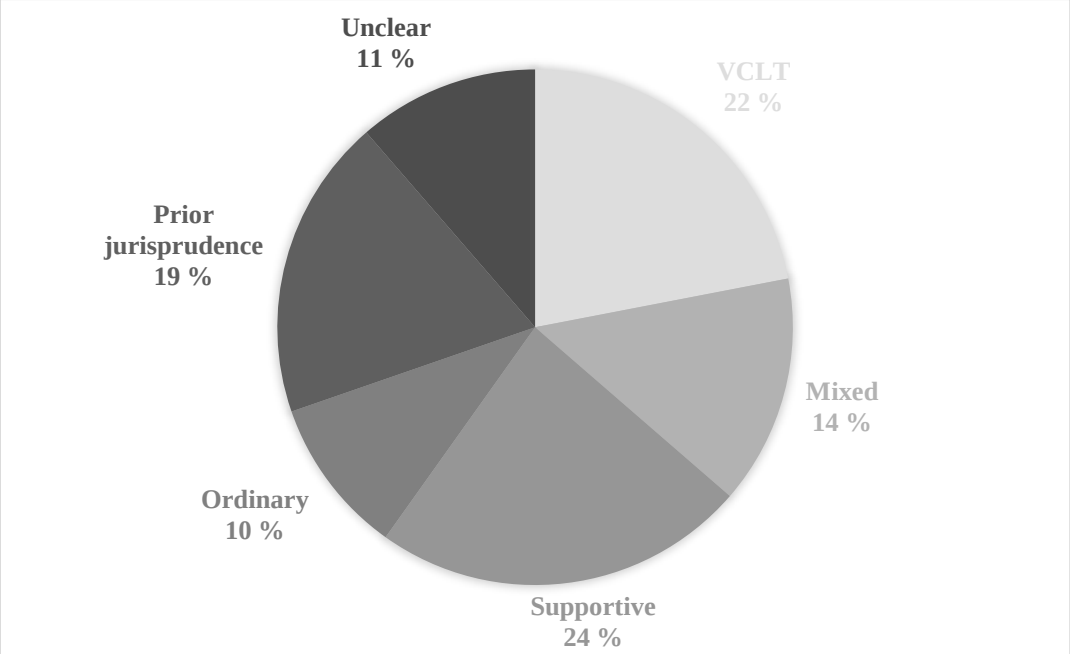
Prior studies of interpretation by investor-state tribunals have indicated the limited use of the Vienna Convention method. In a quantitative study of the first 100 decisions of ICSID tribunals, Fauchald concluded that the Vienna Convention rules were only used as general arguments in support of the tribunal's approach in almost all decisions[51]. Based on these results, Fauchald concluded that ICSID tribunals may follow an approach that includes important elements of a "self-contained regime". Similarly, Reinisch concluded that the practice of investor-state tribunals relied more heavily on the context of other investment treaties as well as general international law than would be the case under an approach more strictly within the confines of the Vienna Convention rules[52]. Figure 2 supports these results on the limited

[51] Fauchald (n 10) 314; see also Weeramantry (n 31) 157.

[52] Reinisch (n 16) 410.

utilisation of the Vienna Convention method as well as the continuation of the practice by more recent investor-state tribunals.

Figure 2: Interpretation methods



Further, Table 1 also illustrates the relatively stable use of the various interpretation "methods" throughout the empirical year-study[53].

Table 1: Interpretation methods by year

	2008	*2018*	*2019*	*2020*
VCLT	29 %	17 %	23 %	22 %
Mixed	13 %	10 %	18 %	17 %
Supportive	21 %	24 %	21 %	28 %
Ordinary	13 %	14 %	10 %	0 %
Prior jurisprudence	17 %	21 %	15 %	22 %
Unclear	8 %	14 %	13 %	11 %

[53] 1998 has been omitted from Table 1 due to the small number of decisions, thereby representing quite different results from the years with a significantly larger number of decisions. However, 1998 has not been excluded from the results in Figure 2.

While there is some evidence of the application of a treaty interpretation method in line with the requirements of the Vienna Convention, there are slightly more decisions that merely refer to the Vienna Convention in a general way, the "supportive method". Furthermore, combining the use of the supportive and the prior jurisprudence method significantly overwhelms the number of decisions that rely on a more traditional and transparent Vienna Convention method. One hopeful sign of the predictability of interpretation method through the mere reference to the Vienna Convention is that majority of tribunals that adopted an unclear method do not refer to the Vienna Convention[54].

Comparing the results from Figure 1 and Figure 2 makes it clear that references to the Vienna Convention does not necessarily correlate with a clear interpretation method. Although 64.2% of the decisions refer to the Vienna Convention as the guiding interpretative principle, only 22% of the decisions actually appear to adopt a clear Vienna Convention interpretation method. Consequently, the mere reference to the Vienna Convention is not enough to bring stability and predictability to the legal reasoning of investor-state tribunals. Certainly, the fact that the Vienna Convention is referred to by a tribunal does not seem to correlate with a clear interpretation method.

2 Treaty provisions and their interpretation method

When we consider the nature of the provisions being interpreted by the tribunals, the different approaches to interpretation method may in fact follow a more cohesive pattern than the overarching empirical results may suggest. The Vienna Convention method is more often followed when a tribunal is interpreting jurisdictional provisions. This is exemplified by the mixed method decisions. For those decisions, the tribunals primarily followed the Vienna Convention when interpreting jurisdictional provisions but relied on prior jurisprudence or an unclear method when interpreting the substantive obligations of the treaty. For example, in *Foresight Luxembourg v Spain*, the tribunal stated that it was required to interpret the provisions of the Energy Charter Treaty (ECT) in accordance with "the normal canons of treaty interpretation" in the Vienna Convention[55]. In interpreting Article 26 of the ECT on jurisdiction, the tribunal began its interpretative exercise clearly in accordance with Article 31(1) of the Vienna Convention, namely an investigation of the ordinary meaning of the terms in their context, taking into account the object and purpose of the treaty. The textual approach to interpretation under the Vienna Convention led the tribunal to conclude it had jurisdiction over an intra-EU investment dispute, without need to resort to supplementary means of interpretation[56]. Similarly, when interpreting "taxation measure" in Article 21 of the ECT, which purports to exclude the application of the ECT to taxation measures, the tribunal turned

[54] 15 decisions were categorised as unclear interpretation method. In 6 of those decisions, the tribunal referred to the Vienna Convention as the rule on interpretation to be followed.

[55] *Foresight Luxembourg Solar 1 S ÁR1, et al v Kingdom of Spain* (SCC Case No 2015/150), Final Award, 14 November 2018 [201].

[56] ibid 204–212.

to context and the "unambiguous language" of the provisions in its interpretation, resulting in the dismissal of jurisdiction for some of the disputed measures[57].

However, when it came to interpretation of the provisions on liability, the approach of the tribunal was significantly different. While the tribunal considered its first task was to determine the content of the fair and equitable treatment (FET) obligation in accordance with the Vienna Convention[58], the tribunal rather skipped the primary rule of treaty interpretation in Article 31 and relied primarily on the "well established" and "widely accepted" interpretations of the FET standard by other tribunals under the ECT[59]. This is not necessarily problematic from the viewpoint of consistency in standards of investment protection, particularly in circumstances where a tribunal is referring to earlier decisions under the same treaty. Standards such as FET and expropriation are rarely defined in investment treaties and so "re-inventing the wheel"[60] every time the standard is brought before a tribunal could be both overly cumbersome for tribunals and more likely to lead to inconsistent and unpredictable outcomes for stakeholders. As the tribunal in *Glencore v Colombia* noted, "[t]he fair and equitable standard is a legal concept which, though typically not further defined, has a content that can be established by the rules of interpretation of the VCLT, aided by the jurisprudence of international tribunals"[61]. Nevertheless, the *Foresight* tribunal's decision demonstrates the pragmatic approach to interpretation of substantive obligations compared to adherence to the Vienna Convention method for jurisdictional provisions. The approach to substantive obligations may reflect some implicit meaning of these otherwise undefined standards of protection but it does not accord with the Vienna Convention rules nor necessarily the intention of the negotiating parties. This ad hoc approach to the different provisions reflects the importance of consent to jurisdiction under the individual treaties and tribunals' recognition of some implicit meaning of the otherwise undefined standards of protection. It also explains the high number of interpretation exercises not undertaken in accordance with the Vienna Convention rules.

IV External Coherence: Interpretation Choices and Broader International Law

1 Defragmentation and coherence of international law

Within the creative and discretionary power of interpretation, the nature of international law has meant that the question of treaty interpretation has come to attract significant attention and interpretation questions frequently arise before tribunals. The interpretative techniques employed by international courts and tribunals play an integral role in understanding the relationship between international laws, whether international law has a systemic nature or

[57] ibid 247 et seq.

[58] ibid 343.

[59] ibid 351–2.

[60] *OperaFund v Spain* (ICSID Case No ARB/15/36), Award, 6 September 2019 [380], referring to the prior decisions on intra-EU objections not requiring a new examination of all the details of the objection.

[61] Glencore International AG and CI Prodeco SA v Republic of Colombia (ICSID Case No ARB/16/6), Award, 27 August 2019 [1308].

more individualised within regimes. How the tribunals approach interpretation and the method of legal interpretation and reasoning can affect whether they "build systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose":

> *Far from being merely an "academic" aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators. This results precisely from the "clustered" nature in which legal rules and principles appear. But it may also be rationalized in terms of a political obligation on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer*[62].

As such, treaty interpretation can be seen as part of the solution to fragmentation of international law: a unified and coherent method of interpretation confirms the coherence of international law as a system[63]. If such coherence in method becomes deeply embedded in legal thinking, international law is not simply a haphazard collection of rules and principles but rather a system[64].

Tribunals have a certain amount of "interpretation space"[65], which can then become part of the problem of fragmentation, providing potential for the interpretation of the same rules differently[66]. The choice of interpretation method and the justification for recourse to one rule instead of another can be the difference between harmonization of conflicting standards and prioritisation of standards.

This is not to say that coherence of the international legal system is the only legitimate goal of interpretation. Legal reasoning and interpretation by arbitrators is but one part of the complex international legal system[67] in which investment law finds itself. The coherence of the international legal system may have to be balanced against settling individual cases and the internal legitimacy of the regimes of international law. Nevertheless, this paper takes the view that adjudication within the limits of the customary rules of interpretation enhances the internal legitimacy of the investment regime, alongside the development of the system of international law.

As a starting point on the inclusion of investor-state dispute settlement within the broader international legal system, it is clear from empirical studies of tribunal reasoning that decisions

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[62] Koskenniemi (n 17) para 35.

[63] Bjorge (n 34) 533 et seq.

[64] Koskenniemi (n 5) 567.

[65] For example, Hernández refers to the vagueness of the general rule on the interpretation of positive acts in international law has created enormous discretion for judicial institutions: Hernández (n 26) 167.

[66] Pauwelyn and Elsig refer to the peculiar nature of treaties and fragmentation as providing for interpretation as both the solution and as part of the problem: Pauwelyn and Elsig (n 5).

[67] See the discussion of this point in Duncan French, 'Treaty Interpretation And The Incorporation Of Extraneous Legal Rules' (2006) 55 International & Comparative Law Quarterly 281.

by other international tribunals are useful interpretative guides[68]. Jurisprudence of the International Court of Justice (ICJ) is the most commonly referred to by investor-state tribunals in their interpretation. Other international economic tribunals, in particular decisions of panels of the World Trade Organization, have been utilised in interpreting national treatment and security exception provisions[69]. Jurisprudence of human rights courts, particularly the European Court of Human Rights, has also helped shaped the understanding of the principle of proportionality[70] and fair trial rights[71].

The most common references to ICJ jurisprudence are to those cases that could also be labelled as general principles, such as *Monetary Gold*[72], *Barcelona Traction*[73] and *Chorzow Factory*[74]. However, the special nature of the investment regime still has to be borne in mind when jurisprudence of other international courts and tribunals is relied on. The *Barcelona Traction* dictum is the clear example of where investment law has effectively contracted out of general international law. While general international law, pursuant to *Barcelona Traction*, does not recognise derivative claims, tribunals have consistently found they have jurisdiction to entertain shareholder claims based on an interpretation of "investor" within the respective treaty[75]. Nevertheless, the drawing from the other principles established by the ICJ lends support for the role of general international law within investor-state dispute settlement. A conclusion that leads to consideration of Article 31(3)(c) of the Vienna Convention as an avenue through which tribunals can align investment law with other areas of international law.

2 Article 31(3)(c) of the Vienna Convention

Systemic integration is the clearest example of rules of interpretation potentially contributing to the defragmentation and coherence of the international legal order. The principle

[68] See, for example Damien Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis' (2017) 20 Journal of International Economic Law 279; Niccolò Ridi, 'Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement' in Daniel Behn, Malcolm Langford and Szilárd Gáspár-Szilágyi (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020).

[69] For example, *Continental Casualty v Argentina* (ICSID Case No ARB/03/9), Award, 5 September 2008 [192].

[70] For example *RWE Innogy GmbH and RWE Innogy Aersa SAU v Kingdom of Spain* (ICSID Case No ARB/14/34), Award, 18 December 2020 [570].

[71] *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3), Award, 6 May 2013 [172].

[72] Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA), Preliminary Question, Judgment [1954] ICJ Reports 19.

[73] The Barcelona Traction, Light and Power Company Limited (New Application: 1962) (Belgium v Spain), Preliminary Objections, Judgment [1964] ICJ Reports 6.

[74] Factory at Chorzów (Germany v Poland), Jurisdiction (n 30).

[75] See the reasoning in *GAMI Investments, Inc v United Mexican States* (UNCITRAL ad hoc), Final Award, 15 November 2004 [30]; which has been followed in recent tribunal decisions: see, for example, *Thomas Gosling and others v Republic of Mauritius* (ICSID Case No ARB/16/32), Award, 18 February 2020 [138].

of systemic integration, to which Article 31(3)(c) is said to give expression[76], is described in the International Law Commission's (ILC) Fragmentation Report:

> *…all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment – that is to say "other" international law*[77].

The principle goes further than merely restating the applicability of general international law, but rather "to take into account the normative environment more widely"[78]. This principle reflects the fact that treaties are themselves creatures of international law and so must be applied against the background of the general principles of international law[79]. The fundamental nature of this principle leads McLachlan to not simply describe Article 31(3)(c) as customary international law, but rather as a constitutional norm of the international legal system, a technique of interpretation that permits reference to other rules of international law, enabling the harmonization of rules and thereby avoiding conflict of norms[80].

The principle of systemic integration requires the tribunal to draw a distinction between using rules of international law as part of the interpretative process and applying the rules of international law directly to the facts. An applicable law clause plays a more important role than interpretation: an applicable law clause imposes "a positive affirmative duty" to apply certain law in settling the dispute, whereas Article 31(3)(c) merely enables external interpretative guidance[81]. However, a fine line must be treaded to ensure treaty interpretation using Article 31(3)(c) is not used "to displace the applicable law"[82]. A liberal approach to interpretation can open the regime's applicable law up to the systemic nature of international law. In this way, the role of interpretation may be overstated in regulating normative relationships, arguably based "on an understatement of the distinction between interpreting and applying international legal norms"[83].

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[76] Koskenniemi (n 17) para 420.

[77] ibid 423 (emphasis in original).

[78] ibid 414–415.

[79] McLachlan (n 17) 280.

[80] ibid 280.

[81] Kurtz (n 29) 280.

[82] *Oil Platforms* (n 2) 238 (separate opinion of Judge Higgins).

[83] As Gourgourinis argues, 'the international legal contours of the contemporary fragmentation analytics, as will be canvassed below, appear, unjustifiably I argue, limited to an overstatement of the role of interpretation in regulating normative relationships, based exactly on an understatement of the distinction between interpreting and applying international legal norms': Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 Journal of International Dispute Settlement 31, 36.

Systemic interpretation is not an exact science as the ILC's Fragmentation Report highlighted. The level of generality with which Article 31(3)(c) has been drafted leaves investor-state tribunals with significant uncertainty in how to apply Article 31(3)(c). The ILC's Fragmentation Report noted the following criticisms that have been levelled against the "substantive and temporal scope and well as the normative force" of the provision:

(a) How widely should "other law" be taken into account?
(b) What about prior or later law?
(c) And what does "taking into account" really mean?[84]

These questions remain despite the application of Article 31(3)(c) by a number of international courts and tribunals, providing several avenues of divergence in treaty method for tribunals. The purpose of this paper is not to identify the limits of systemic integration[85]. Rather, analysing the use of systemic integration by investor-state tribunals contributes to our understanding of investment law's contribution to, and consistency with, the broader international legal order and the methods of treaty interpretation

A. Empirical view of systemic integration

A simple empirical assessment of the use of Article 31(3)(c) (or general reference to "systemic integration") illustrates that the principle is rarely relied on by arbitral tribunals. Limiting this empirical assessment to cases where a party or tribunal has specifically turned their mind to the Article 31(3)(c) argument[86], we find only 64 investor-state decisions. In these decisions, there is a fairly even distribution of international law taken into account (interpretation under Article 31(3)(c) accepted by the tribunal) compared to the rejection or side-lining of the interpretation argument (tribunal found it not necessary to decide the Article 31(3)(c) argument), as illustrated in Table 2.

Table 2: references to systemic integration

	Accepted	*Rejected*	*Not necessary to decide*
Number	24	22	18
Percentage	37.5%	34.4%	28.1%

[84] Koskenniemi (n 17) para 423.

[85] On such limitations see, the dissenting and separate opinions in *Oil Platforms* (n 2); McLachlan (n 17); Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff 2015); see also Kammerhofer (n 17) 132 ff.

[86] This removes decisions containing only mere references to article 31(3)(c) as part of the Vienna Convention interpretation process.

Relevantly, this small number of decisions using the interpretative method of Article 31(3)(c) are concentrated in the post-2010 period. Prior to 2006, there were no references to Article 31(3)(c) at all, potentially aligning with the resurgence of Article 31(3)(c)'s popularity following the *Oil Platforms* decision[87]. However, even more noteworthy, 18 of the decisions dealing with Article 31(3)(c) concerned the intra-EU objection in which one of the alternative arguments of the respondent states on whether the investment treaty was inconsistent with EU law was based on Article 31(3)(c)[88]. This small number of decisions using the interpretative method of Article 31(3)(c) may raise concern on the coherence of investment law with the international legal order as there is a clear legal method for international law to play a role in interpretation that may not be adequately utilised in investment disputes. In light of the lack of adherence to the Vienna Convention method discussed in Chapter III above, it is perhaps less surprising and fits within the tribunal's ad hoc and pragmatic approach to interpretation. The limited use by tribunals may also reflect the uncertainty surrounding Article 31(3)(c) of the Vienna Convention.

B. Interpretation method and systemic integration

When we turn away from empirical results, we find little other comfort in the tribunals' approach to systemic integration. The interpretation method of tribunals seems to lack consistency as well an understanding of the line between application and interpretation. Article 31(3)(c) has a high level of generality, as pointed out in the ILC's Fragmentation Report. Article 31(3)(c) can be broken down into several aspects, each of which may be the subject of different formulation from one tribunal to the next. First, and perhaps least controversially, the provision refers to "rules of international law". Secondly, the rules must be relevant, thereby suggesting a subject-matter connection between the treaty interpreted and its Article 31(3)(c) partner. Finally, the rules must be applicable in the relations between the parties. Two issues are raised by this part of the provision: there is no temporal stipulation as to whether the rules are relevant when the treaty was concluded or at the date of dispute, and there is no stipulation whether it is all parties to the treaty or only the parties to the dispute. Analysing the approach of tribunals to each of these aspects of Article 31(3)(c) sheds some light on coherence in method or, if no such coherence exists, may indicate some of the treaty interpretation choices that are being made by tribunals[89]. Due to the small number of decisions dealing with systemic integration and the diverse range of rules of international law invoked through this process, it is difficult to identify a pattern in the application of the general criteria of Article 31(3)(c) in tribunal reasoning.

One of the few observations that can be made from this limited number of decisions is the different treatment of customary compared to treaty law that has been taken into account using

[87] *Oil Platforms* (n 2); McLachlan refers to the 'dramatic deployment' of systemic integration in Oil Platforms as reigniting interest in the principle's scope and application: McLachlan (n 17) 280.

[88] See, for example *Vattenfall AB and others v Federal Republic of Germany (II)* (ICSID Case No ARB/12/12), Decision on the Achmea Issue, 31 August 2018.

[89] Pauwelyn and Elsig refer to interpretation choices in explaining the variation of interpretative methods across tribunals: Pauwelyn and Elsig (n 5).

Article 31(3)(c). This relates to the question of what are "relevant rules" that are "applicable between the parties". Tribunals appear more hesitant to apply other treaty law in the interpretation exercise in Article 31(3)(c). In *B-Mex v Mexico*, the tribunal had to determine whether the claimant was an investor who could make a claim "on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly" under Article 1117 of NAFTA[90]. The treaty definition did not include an ownership threshold. The claimant pointed to several international treaty instruments, such as the General Agreement on Trade in Services (GATS)[91], the Multilateral Investment Guarantee Agency (MIGA) Convention[92] and the OECD Declaration on International Investment and Multinational Enterprises, which provided definitions of "ownership" that included ownership thresholds. However, the tribunal found that GATS and the MIGA Convention were inapplicable since the choice not to define "ownership" in the relevant investment treaty should be respected. The OECD Declaration was found inapplicable as it was not a rule applicable in the relations between *all* the NAFTA parties. As such, the tribunal found that none of these rules affected the plain reading of "ownership"[93]. Similarly, tribunals have been hesitant to apply human rights treaties where such treaties have not reached the level of customary international law. In *South American Silver v Bolivia*, the respondent argued that the tribunal must apply certain international rules on human rights protection. However, the tribunal considered it was not satisfied that it must apply such rules that do not constitute customary rules, nor had the respondent shown that either of the Contracting Parties were parties to the invoked human rights treaties[94]. The legal reasoning by the tribunals in these decisions thus indicates the more restrictive application of the criteria of "applicable between the parties" and the difficulty with otherwise applying treaty law through the prism of Article 31(3)(c).

The small number of examples of legal reasoning of tribunals has also made it difficult to find a pattern in what "taking into account" actually means in the Article 31(3)(c) interpretative exercise. The systemic integration process is often difficult to distinguish from a direct application of other international law, a distinction that tribunals themselves often fail to consider[95]. Tribunals have made use of Article 31(3)(c) in interpreting jurisdictional conditions in such a way that may affect the applicable law. For example, whether the customary exception

[90] North American Free Trade Agreement (17 December 1992), 32 ILM 289.

[91] General Agreement on Trade in Services (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, Article XXVIII(n) which defined a juridical person is 'owned by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member'.

[92] Convention establishing the Multilateral Investment Guarantee Agency (Seoul, 11 October 1985), 1508 UNTS 99, Article 13(a)(ii) which defined an eligible investor as including, inter alia, 'such juridical person is incorporated and has its principal place of business in a member or the majority of its capital is owned by a member or members or nationals thereof, provided that such member is not the host country in any of the above cases'.

[93] *B-Mex, LLC and Others v United Mexican States* (n 6) para 204. Similarly the tribunal rejected the application of these instruments in defining control at [221].

[94] South American Silver Limited (Bermuda) v The Plurinational State of Bolivia (PCA Case No 2013-15), Award, 22 November 2018 [217].

[95] See discussion of the necessity defence in this respect in Reinisch (n 16) 395.

of futility in relation to the exhaustion of local remedies was applicable to an investment treaty was the subject of debate in the tribunal's decision in *Ambiente v Argentina*. For the majority, Article 31(3)(c) played an integral role in interpreting the investment treaty provision, enabling the majority to apply the customary exception. The majority considered that there were strong parallels between the investment treaty clause on exhaustion of local remedies and the customary law prerequisite to have recourse to domestic courts in diplomatic protection, meaning it was not "a far-fetched conclusion to assume that the futility exception" is applicable[96]. Despite going on to acknowledge the difference between the two types of clauses, the majority concluded that an interpretation of the investment treaty clause "in light of" Article 31(3)(c) results in the admission of a futility exception, modelled on the futility exception in the field of diplomatic protection[97]. This aspect of the majority reasoning was subject to significant criticism by Arbitrator Bernárdez. The dissenting arbitrator lamented the fact that the majority applied "that so-called threshold without even asking whether it was actually part and parcel of a rule of positive international law *applicable* in the relations [between the parties to the investment treaty], as directed by Article 31(3)(c)" [98]. Arbitrator Bernárdez went on to stress the requirement of consent to jurisdiction, which cannot be overridden by an evolutionary interpretation under Article 31(3)(c):

> *It is also in order to recall that Article 31(3)(c) of the VCLT is sometimes invoked as providing support for "evolving interpretations" of treaty terms or expressions, after verifying the original intention of the parties to the instrument. However, in so far as "jurisdictional conventional obligations" evolving interpretation methods are unjustified unless expressly permitted or necessarily implied by the terms used by the text of the treaty or by general practice in its application, the reason being that the State's consent to jurisdiction rule is unfriendly to the validation of alleged "implied consents". Furthermore, in the present case it has not been plead, and still less proven, that the rule of State's consent to jurisdiction has evolved since the conclusion of the 1990 Argentina-Italy BIT. On the contrary, the rule has been confirmed in the most recent jurisprudence of the ICJ*[99].

These examples raise both hope and concern for the coherence of international law and methods of treaty interpretation. Hope, in the sense that there is evidence of tribunals following the Vienna Convention method in utilising Article 31(3)(c) and that the incorporation of customary international law through the Article 31(3)(c) process contributes to the coherence of the international legal order. On the other hand, the issues with distinguishing application and interpretation under Article 31(3)(c) as well as the inconsistency in the Article 31(3)(c) process point away from a coherence in treaty interpretation methods. Aligning interpretation methods to the international legal order on Article 31(3)(c), theoretically, could benefit the

[96] *Ambiente Ufficio S.pA and others v Argentine Republic* (ICSID Case No ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013 [603].

[97] ibid 607.

[98] ibid 56 (dissenting opinion of Arbitrator Bernárdez).

[99] ibid 343 (dissenting opinion of Arbitrator Bernárdez).

investment regime. Yet, given the uncertainty in relying on Article 31(3)(c) by investor-state tribunals, this may be wishful thinking.

V Conclusion

Interpretation in investment law is not an exact science. This paper has sought to provide a snapshot of a particular value of interpretation: coherency of method of interpretation and its contribution to coherency of the international investment system and the international legal order more generally. Such consistency with the methods of treaty interpretation in international law could enhance the legitimacy of the investment law regime as well as contributing to the broader international legal order. However, current results are mixed. Investor-state tribunals could be doing much more to incorporate the rules of treaty interpretation within their legal reasoning and decision-making. In the current UNCITRAL reform process, states have pointed to the need for consistency and coherence in decision of investor-state tribunals, values that support the rule of law. Any reform options should take into account the current inconsistency in the methods of treaty interpretation and how this contributes to the ongoing concerns with investor-state arbitration.

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