The Vienna Convention on the Law of Treaties in Investor-State Disputes

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History, Evolution and Future

Edited by

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Michael Waibel is a professor of international law at the University of Vienna. His teaching and writing focus on international law, international economic law, sovereign debt and international dispute settlement. He received the Deák Prize of the American Society of International Law, the Book Prize of the European Society of International Law and a Leverhulme Prize for his research. He is co-general editor of the ICSID Reports (with Jorge Viñuales) and co-editor-in-chief of the Journal of International Economic Law (with Kathleen Claussen and Sergio Puig).

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Summary of Contents

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List of Abbreviations

ARSIWA	International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as adopted in August 2001
BIT	Bilateral Investment Treaty
CFIA	Cooperation and Facilitation Investment Agreement
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EPA	Economic Partnership Agreement
EU	European Union
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICCA	International Council for Commercial Arbitration
ICJ	International Court of Justice
ICS	Investment Court System
ICSID (also referred to as the 'Centre' in certain chapters)	International Centre for Settlement of Investment Disputes
ICSID (AF) Rules	ICSID Additional Facility Rules

ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded in Washington, D.C. on 18 March 1965 and entered into force on 14 October 1966 (also known as the Washington Convention)
ICSID Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
IIA	International Investment Agreement
ILC	International Law Commission, established by the United Nations General Assembly in 1947
ISDS	Investor-State Dispute Settlement
MFN	Most-Favored-Nation
MIC	Multilateral Investment Court
MIT	Multilateral Investment Treaty
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York on 10 June 1958 and entered into force on 7 June 1959
NIEO	New International Economic Order
NT	National Treatment
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development, established in 1964 as an Intergovernmental Organisation
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties concluded in Vienna on 23 May 1969 and entered into force on 27 January 1980
WTO	World Trade Organization

Foreword

The law applicable to international treaties was one of the first topics selected for codification by the International Law Commission in 1949. The project progressed under a series of eminent rapporteurs, leading to final draft articles in 1966. The draft articles were adopted in 1969 as the *Vienna Convention on the Law of Treaties* (VCLT), which entered into force on 27 January 1980.[1] As of 1 April 2022, there were 116 Parties and 45 signatories to the VCLT.[2] In addition, several States that have not ratified the treaty have expressed their view that portions of the VCLT codify customary international law and are binding on all States.[3] As a result, it has earned its reputation as one of the most consequential treaties in international law.

At the same time as the VCLT was under discussion, two distinct, investment treaty-specific, initiatives were also gaining momentum. These were developed by different institutions and drafted quite separately. Ultimately these instruments work in tandem with the VCLT to elaborate international investment law and procedure.

The first of these instruments was the drafting of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) by the Executive Directors of the World Bank, which was subsequently adopted by the World Bank Member States in 1966. The ICSID Convention, itself a treaty as defined by the VCLT,[4] established the framework for arbitration and conciliation of international investment disputes under the Convention.

The second relevant initiative was the negotiation of binding investment treaties offering dispute resolution (usually arbitration) to foreign investors with respect to

1. *See* Aust, Anthony, *Modern Treaty Law and Practice*, Cambridge Press (2000) p. 6. The VCLT is cited as 1155 U.N.T.S. 331, at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
2. United Nations Treaty Collection at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.
3. For example, the United States has not ratified the VCLT but has stated that it considers that many provisions of the VCLT constitute customary international law: https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm.
4. *ICSID Convention*, Chapter X, at: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.

disputes arising from investments made in the host State. The first such treaty was the bilateral investment treaty concluded between Germany and Pakistan in 1959.[5] Bilateral investment treaties continued to be negotiated over the 1970s and 1980s, with record numbers concluded in the 1990s.

Not only has the number of investment treaties increased exponentially in the last fifty years – their profile has changed as well. Investment treaties have been concluded by different groups of States, for example, as regional or sectoral treaties, as treaties concluded by regional economic integration organisations, and with some placed in the framework of a free trade agreement (FTA). Overall, more than 3,100 such agreements have been concluded to date.[6]

The growth of investment treaties also brought about an increase in investment arbitration proceedings, the vast majority of which have been administered at the International Centre for Settlement of Investment Disputes. Since 1987, more than 1,100 arbitration cases have been commenced based on consent in an investment treaty or an investment chapter in a FTA.[7] In turn, investment treaties have been interpreted by numerous arbitral tribunals, by ad hoc committees (in ICSID Convention cases), and by domestic courts with review jurisdiction (in non-ICSID Convention cases), creating a substantial and growing body of international investment law. As the number of cases has grown so has the scope and complexity of treaties, frequently in response to an interpretation of their text. The VCLT has very much been a part of this evolution.

The impact of the VCLT in international investment arbitration is most evident in the overall approach taken to interpretation of an investment treaty. Most investment tribunals commence their analysis by referring to Article 31 of the VCLT and its fundamental rule that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in light of its object and purpose. They may also apply Article 32 to justify resort to supplementary means of interpretation, or Article 33 where an interpretive issue arises from texts in multiple languages. While commentators debate whether individual tribunals have applied the VCLT rules properly in any individual case, or whether they have done a sufficiently detailed VCLT analysis,[8] there is no dispute that the VCLT interpretive rules are the relevant primary rules to apply in an investor-State arbitration proceeding.

Interestingly, the most recent generation of investment treaties may be altering this dynamic, or perhaps more correctly, supplementing it. New generation treaties often use numerous drafting techniques to guide the interpreter 'in the right direction'. Many new treaties include very detailed provisions or annexes explaining how to

5. Germany-Pakistan BIT 1959/1962, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1732/germany---pakistan-bit-1959-.
6. *See* UNCTAD Investment Treaty Navigator for individual treaties, at: https://investmentpolicy.unctad.org/international-investment-agreements.
7. UNCTAD, Investor-State Dispute Settlement Cases – Facts and Figures 2020, IIA Issues Note (September 2021), at: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf.
8. *See* Chapters 2-8 of this book.

interpret a substantive obligation, most often expropriation,[9] fair and equitable treatment,[10] national treatment,[11] or most-favoured-nation treatment.[12] Recent treaties often contain 'for greater certainty' clauses, and increasingly use footnotes, again to direct the treaty interpreter to the correct understanding of the text.[13] Some recent treaties suggest how a clause should be construed, for example, that the challenged measures should not be construed as inconsistent with the treaty obligations where the investment activity is undertaken in a manner sensitive to environmental, health, safety or other regulatory objectives.[14] Where investment obligations are found in a FTA, they usually include rules of precedence to determine whether a potentially conflicting obligation in another chapter will prevail in an investment dispute[15] or rules of precedence with other treaties to which the signatories are also party.[16]

Another set of interpretive tools in new generation investment treaties expressly carves out a primary role for the treaty Parties to interpret the treaty. The best examples of this technique are clauses creating a joint committee of the treaty Parties and allowing them to issue notes of interpretation on the investment obligations.[17]

In a similar vein, recent treaties frequently give non-disputing treaty Parties the right to make submissions on the interpretation or application of the treaty, recognising the Parties' systemic interest in correct and consistent interpretation.[18]

Observers may debate whether this interpretive supplementation to the VCLT is necessary or useful, but it is certainly not surprising. The combination of a relatively large number of investment treaties and investment cases in the last fifty years has

9. *See*, for example, Art. 10.13 and Annex 10B, RCEP 2020/2022, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6032/download; or Annex 9B, CPTPP 2018, https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/9.-Investment-Chapter.pdf.
10. *See*, for example, Art. 10.5 and Annex 10A, RCEP 2020/2022, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6032/download; or Art. 2.4 EU-Singapore IPA 2018 at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download.
11. *See*, for example, Drafters' Note on Interpretation of 'In Like Circumstances' under Art. 9.4 (National Treatment) and Art. 9.5 (Most-Favoured-Nation Treatment) in Chapter 9, CPTPP 2018, at: https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Interpretation-of-In-Like-Circumstances.pdf; or Art. 2.3, EU-Singapore IPA 2018, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download.
12. *See*, for example, CPTPP 2018, Art. 9.5(3), at: https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/9.-Investment-Chapter.pdf.
13. *See*, for example, Chapter 9 of the CPTPP 2018 on Investment, which includes forty-eight footnotes and twelve Annexes.
14. *See*, for example, Art. 14.16 of USMCA 2018/2020, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018-.
15. *See*, for example, Art. 14. 3 of USMCA 2018/2020, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018-, providing that other chapters prevail to the extent of any inconsistency.
16. *See*, for example, Art. 1.4, Cambodia-Korea FTA 1997, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6388/download.
17. *See*, for example, Art. 25, Japan-Georgia BIT 2021, at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6078/download.
18. *See*, for example, Art. 10.20.2 of the CAFTA-DR 2004/2009, at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2693/download.

meant that numerous fact patterns have been interpreted under numerous treaties that are of a similar type but are by no means homogenous or identical. In addition, these provisions are interpreted by different panels of arbitrators and presented in different ways by different counsels. This has given rise to a lively debate about whether there is sufficient consistency, coherence, or correctness in investor-State jurisprudence, and indeed, to what extent one should expect consistency in a system with ad hoc arbitrators and no formal doctrine of precedent.

One might also ask what the practical impact of these supplementary interpretive tools will be. Will they ensure more consistent, coherent, or correct interpretations of treaty text? Conversely, could they contribute further to fragmentation and disharmony in the interpretation of similar but not identical obligations? And how will the VCLT continue to factor into the task of interpretation in the face of more specific and directive text drafted by treaty negotiators? These questions have yet to be examined systemically and will continue to arise in cases initiated pursuant to new generation treaties.

This book is an especially valuable contribution to thinking about the role of the VCLT in modern investment law and to answering these questions. Dr Shirlow and Professor Gore have focused on the nexus of the VCLT, international investment law, and investment arbitration, providing a unique perspective on the use of the VCLT to resolve investment treaty disputes. The large and growing body of these arbitrations and their use of the VCLT over the past decades make this book especially persuasive.

Dr Shirlow and Professor Gore very helpfully narrate the book by providing commentary for each part. Their introduction in Chapter 1 commences with an overview of the development of the VCLT, allowing the reader to situate the treaty in the public international law realm. This is an especially helpful foundation for considering the rest of the text. Part I looks in depth at how Articles 31 through 33 of the VCLT have been applied in practice. The chapters in this section grapple with the difficulty of applying the well-known words of the VCLT to specific factual contexts and legal arguments.

Part II moves to the creation and application of treaties. The focus of this part includes the relevance of the VCLT to a treaty's entry into force, the use of the VCLT in State territory and succession problems, and the application of the VCLT to resolve temporal issues arising in treaty interpretation. Part III considers the role of the VCLT in analyzing some of the most difficult questions currently faced in international investment arbitration. These include the modernisation and reform of investment treaties, the impact of the termination of intra-EU treaties, the proposal for a Multilateral Investment Court, and whether the ICSID Convention could accommodate an appeal mechanism in the future. Finally, Part IV features three chapters that consider the role of the VCLT as a unifying force in these discussions, including how the VCLT might be used to resolve bottlenecks in the New York Convention, the VCLT's role in resolving conflicts between successive treaties, and a discussion of *lex specialis*. Dr Shirlow and Professor Gore conclude the book with their views on how some of these conflicts will be addressed in the coming years and what can be expected in this area of the law in the future.

The editors and contributors have curated a superb collection that is educational and thought-provoking, and I have no doubt that readers will find this book extremely useful. This volume is the perfect way to celebrate the first half-century of the VCLT: a review of what it has done and an informed assessment of what it may yet do in the next half-century.

3 April 2022
Meg Kinnear
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CHAPTER 1

An Introduction to the VCLT and Its Role in ISDS: Looking Back, Looking Forward

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This chapter introduces the present book, The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future. *The publication of this book celebrates two important VCLT-related milestones: the fiftieth anniversary of its opening for signature (in 2019) and the fortieth anniversary of its entry into force (in 2020). In the intervening decades, the VCLT – as the 'treaty on treaties' – has achieved a rich and nuanced track record of use in international law. This introduction, and the chapters that follow, focus on the VCLT's influence in investor-State disputes. The significant number of investor-State arbitration decisions and awards, a considerable proportion of which directly engage with the VCLT, makes this a key field of study for understanding the VCLT's contents and impact so that future opportunities for its continued relevance and use can be identified. To open the book and contextualize the chapters that follow, this chapter provides a historical account that examines the VCLT's development, including by detailing the ILC's winding road and iterative process towards the development of the VCLT. It then introduces the contours of the VCLT, explaining its scope and focus, and highlighting its key provisions. It next focuses on the impact of the VCLT beyond its application as a matter of treaty law, noting the extent to which provisions of the VCLT are accepted to reflect customary international law. Finally, it draws out the links between the VCLT, international investment law generally, and investor-State dispute settlement (ISDS) specifically. This final section also introduces the organization and structure of this book, highlighting the book's presentation of perspectives that illuminate the value of looking back on the VCLT and its rich track record, in order to look forward and unlock the utility of the VCLT*

for grappling with emerging systemic challenges in ISDS and international investment law more broadly.

§1.01 INTRODUCTION

The Vienna Convention on the Law of Treaties (VCLT) was adopted and opened for signature on 23 May 1969 and entered into force for original parties on 27 January 1980.[1] The VCLT has since become universally regarded as one of the most important instruments of treaty law. Indeed, it is widely known as the 'treaty on treaties'. As of April 2022, the VCLT has been ratified by 116 States and signed by 45 others.[2] Even some non-ratifying States recognize parts of the VCLT as reflective of customary international law.[3] In a publication to celebrate the seventieth anniversary of the International Law Commission (ILC) – the organization behind the VCLT's development – the VCLT, alongside two other international conventions, was described as being:

> at the heart of international relations among States, relied upon on a daily basis by officials in foreign ministries, diplomatic and consular missions around the world, legal practitioners, judges in international courts and tribunals, and increasingly also national judges.[4]

The ILC marked its seventy-fifth anniversary in 2022, and the status of the VCLT appears only to be growing in importance. The VCLT has been, and continues to be, influential in numerous fields of public international law. This book focuses on the VCLT's influence on and future potential role in international investment law generally and investor-State disputes in particular.

As a starting point, this book looks back on how the VCLT's rules have been invoked, interpreted, and applied by States parties in their treaty-making processes, by practitioners and by parties in investor-State dispute settlement (ISDS) proceedings, and by tribunals in investor-State arbitral decisions and awards. Pausing to revisit the practical uses of the VCLT is timely: 2019 marked the VCLT's golden jubilee – fifty years – since it was opened for signature, and 2020 marked the fortieth anniversary of the VCLT's entry into force. As demonstrated throughout this book, the intervening decades have given rise to a rich and nuanced track record of arbitral tribunals and other stakeholders referring to and using the VCLT's rules to address and resolve key issues of treaty law in investor-State disputes.

This book next seeks to build upon the VCLT's rich history and usage to look forward. By revisiting the role that the VCLT previously has played in investor-State disputes, it becomes possible to unlock insights into how the VCLT might be used to support the development of the ISDS system and international investment law into the

1. VCLT, 1155 U.N.T.S. 331.
2. *See* United Nations Treaty Collection entry on VCLT, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last accessed: 13 Apr. 2022).
3. *See generally* section 1.04 below.
4. United Nations, *Seventy Years of the International Law Commission* (Brill Nijhoff 2021) 15.

future. This book highlights, in particular, the potential role and utility of the VCLT's rules for arbitral tribunals, disputing parties, States and other stakeholders as they strive to reform the ISDS system to ensure that it remains fit for purpose and adequately supportive of the next generation of international investment agreements (IIAs) and the disputes that might arise under them.

At this moment, this forward-looking exercise is crucial. During the past few years, the ISDS system has been subject to strong criticism and scrutiny.[5] Substantively, many opponents of international investment law and ISDS argue that foreign investors should not be permitted to challenge domestic policy regulations from a 'privileged' position, that arbitrators are inherently biased in favour of claimant investors and therefore ill-equipped to render important decisions concerning public policy or the use of public funds, and/or that the lack of coherence and consistency among ISDS decisions undermines the integrity and value this system of dispute settlement entirely.[6] Other concerns are procedural in nature and focus on transparency, the cost and time associated with arbitral proceedings, and/or the need for an appellate review mechanism.[7] Over the past few years, many of these concerns have been the subject of vigorous debate and have also prompted various unilateral, multilateral and institutional reform efforts.

For its part, the International Centre for Settlement of Investment Disputes (ICSID) embarked on a Rule Amendment Project that sought to 'modernize, simplify,

5. *See generally* Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, and Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer 2010); David Caron and Esmé Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences' in Geir Ulfstein and Andreas Føllesdal (eds), *The Judicialization of International Law: A Mixed Blessing?* (OUP 2018).
6. *See, e.g.*, Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32 ICSID Rev. – FILJ 528; Committee on International Trade, 'EU Investment Policy Needs to Balance Investor Protection and Public Regulations, Says International Trade Committee'; Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4 J. Intl. Dispute Settlement 553; Susan Franck and Others, 'International Arbitration: Demographics, Precision and Justice' in Albert Jan van den Berg (ed.), *ICCA Congress Series 18, Legitimacy: Myths, Realities, Challenges* (Wolters Kluwer 2015); Jose Manuel Alvarez-Zarate, 'Searching for Coherence in Trade and Investment Arbitration: Domestic Policies under Siege' (2012) Society of International Economic Law, Conference Paper Series; Alessandra Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law and Policy 2018* (OUP 2019). On arbitral approaches to reviewing public policy decisions, *see* further: Esmé Shirlow, *Judging at the Interface: Deference to Domestic Authority in International Adjudication* (CUP 2021).
7. *See generally* Esmé Shirlow, 'Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration' (2016) 31 ICSID Rev. – FILJ 622; Esmé Shirlow and David D Caron, 'The Multiple Forms of Transparency in International Arbitration, Their Implications, and Their Limits' in Federico Ortino and Thomas Schultz (eds), *Oxford Handbook on International Arbitration* (OUP 2020); Susan Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (2010) 88 Wash. U. L. Rev. 769; Debra Steger, 'Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism' in Armand de Mestral and Celine Lévesque (eds), *Improving International Investment Agreements* (Routledge 2012); Jacques Werner, 'Limits of Commercial Investor-State Arbitration: The Need for Appellate Review' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).

and streamline the rules' applicable to all ICSID proceedings, including proceedings under the ICSID Convention and ICSID Additional Facility.[8] That several-year-long process concluded on 21 March 2022, when ICSID Member States approved the new 2022 ICSID Regulations and Rules, which took effect from 1 July 2022. As explained in ICSID's contemporaneous press release, the revisions seek to reduce the time and cost of cases and provide new expedited arbitration rules capable of cutting case-resolution times in half.[9] The 2022 Rules further offer wider access to ICSID's dispute resolution rules and services through a broadening of the jurisdictional requirements related to ICSID's Additional Facility, provide greater transparency through enhanced public access to ICSID orders and awards, and impose an ongoing obligation on parties to investor-State proceedings administered by ICSID to disclose certain details of third-party funding arrangements.[10]

Meanwhile, a parallel and broader initiative for modernization and reform is underway through a process coordinated by the United Nations Commission on International Trade Law Working Group III.[11] Working Group III strives to address systemic issues in ISDS, including consideration of a proposed appellate mechanism to promote greater coherence and consistency among arbitral decisions, a Draft Code of Conduct to regulate arbitrator disclosures and to ensure conduct adhering to certain standards, and a standing multilateral mechanism for the selection and appointment of arbitrators.

These respective reform initiatives stem from the premise that modernization of the ISDS system generally, and reform of specific ISDS procedures, can address stakeholder concerns. These discussions also benefit from the experiential reality of ISDS, drawing on evidence that demonstrates how key procedural and substantive issues have been resolved through the exponentially increasing number of investor-State arbitrations over the past two decades. Indeed, as of December 2020, United Nations Conference on Trade and Development has recorded more than 1,100 ISDS disputes – more than two-thirds of which were pursued between 2010 and 2020.[12]

8. The 2022 ICSID Rules consist of revised Regulations and Rules for ICSID Convention proceedings, ICSID Additional Facility Proceedings, ICSID Mediation Proceedings, and ICSID Fact-Finding Proceedings.
9. *ICSID News Release: ICSID Administrative Council Approves Amendment of ICSID Rules* (21 Mar. 2022), available at: https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules (last accessed: 13 Apr. 2022).
10. *Ibid.*
11. For the latest information concerning the progress of UNCITRAL Working Group III, *see* https://uncitral.un.org/en/working_groups/3/investor-state. *See also* the series on this topic collated on *Kluwer Arbitration Blog*: Esmé Shirlow, UNCITRAL Working Group III: An Introduction and Update, *Kluwer Arbitration Blog* (23 Mar. 2020), available at: http://arbitrationblog.kluwerarbitration.com/2020/03/23/uncitral-working-group-iii-an-introduction-and-update/ (last accessed: 6 Jul. 2022).
12. As of the end of 2020, UNCTAD has identified 1,104 publicly known ISDS cases. As of the end of 2010, UNCTAD had recorded 390 publicly known ISDS cases. These figures indicate that nearly 65% of all publicly known investor-State disputes were pursued during the 2010s. Compare 'IIA Issues Note No. 4: Investor State Dispute Settlement Cases: Facts and Figures 2020', UNCTAD (September 2021), 1-2, available at: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf (last accessed: 13 Apr. 2022) with 'IIA Issues Note No. 1

While the VCLT alone does not provide all of the solutions necessary to address these challenges, the chapters in this book demonstrate that its tools certainly have a key role to play. For example, the VCLT can guide State practice for entry and exit from specific IIAs, inform the arguments of disputing parties as to how provisions of IIAs are to be understood and applied, and guide the decision-making of arbitral tribunals when such disputes come before them. As such, the VCLT's origins, history, and achievements – reflecting a forty-year track record, and an even longer period of development – have been highly relevant to shaping how international investment law and ISDS have developed, and are likely to have a continuing and important impact on their development over the coming decades.

A further crossroads for international investment law results from the challenges of regime interaction in international law. In today's globalized world, the spheres of various areas of international law increasingly touch, intermingle, and blur.[13] It is not possible to strictly delineate the boundaries of international investment law and exclusively focus on this field as an area of law devoid of a broader international context.[14] Rather, the scope of international investment law, and the IIAs that establish it, substantively interplay with various other specific fields of international law, including human rights law, trade law, and climate law, among others.[15] Moreover, and of particular relevance to a book focused on the role of the VCLT in international investment disputes, international investment law also sits within a context of general international law. This latter body of law – including rules on State responsibility,[16] and treaty law – may apply to key issues in investment disputes wherever different or more specific approaches are not adopted in investment instruments themselves. The VCLT, for its part, encourages some degree of systemic integration and coherence.[17] Within this evolving landscape of systemic stressors, a disciplining force can serve as a beacon.[18] Many of the chapters in this book demonstrate that the VCLT's tools, if

(2010)' (March 2011), 1-2, available at: https://unctad.org/system/files/official-document/webdiaeia20113_en.pdf (last accessed: 23 Apr. 2022).

13. *See generally* Margaret A Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012); Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013); Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law' (2007) 1 EJLS 3.
14. Stephan W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 EJIL 875.
15. *See, e.g.,* Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).
16. *See* especially James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Rev. – FILJ 127; Esmé Shirlow and Kabir Duggal, 'The ILC Articles on State Responsibility in Investment Treaty Arbitration' (2022) ICSID Rev. – FILJ (forthcoming); Kiran Nasir Gore and Gloria M Alvarez, 'The 2001 ILC Articles on State Responsibility: An Annotated Bibliography' (2022) ICSID Rev. – FILJ (forthcoming).
17. *See generally* International Law Commission, 'Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc. A/CN.4/L.682.
18. Kiran Nasir Gore, 'Regime Interaction in Investment Arbitration: Looking Forward, Looking Back on the Vienna Convention on the Law of Treaties as a Disciplining Force in International

employed coherently and consistently, can fulfil emerging needs and help guide the development of international investment law against the broader systemic context in which it exists.

This introductory chapter unfolds in four further parts. Section 1.02 provides historic context related to the VCLT's development. In particular, it presents the ILC's winding road and iterative process towards development of the VCLT as the 'treaty on the law of treaties'. Section 1.03 then sets out the contours of the VCLT, explaining its scope and focus, and highlighting its key provisions. Section 1.04 focuses on the VCLT as a reflection of customary international law. Finally, section 1.05 draws out the links between the VCLT, international investment law generally, and ISDS specifically. This final section also introduces the organization and structure of this book.

§1.02 TOWARDS THE VCLT: A HISTORICAL ACCOUNT

The road towards codifying an international law of treaties, as embodied in the VCLT, was winding and iterative. Most histories of this process begin in the late 1920s and 1930s, noting the various efforts in those years to marshal the lessons emerging from the increased study and practice of international law to develop a modern law of nations.[19] For example, as early as 1926, the League of Nations Committee of Experts on Codification of International Law included on its agenda, among twenty other topics, the codification of rules on the conclusion and drafting of treaties.[20] Such efforts were also pursued by regional groups. The Sixth International Conference of American States, for example, resulted in the adoption of a 'Convention on Treaties' on 20 February 1928 (known as the 'Havana Convention').[21] The text consists of twenty fairly brief articles covering a range of topics, including in particular an article on the conclusion and entry into force of treaties. However, as other commentators have explained, that instrument was considered 'defective' in some respects as it did not provide a definition of the term 'treaty'.[22]

States and international organizations were not alone in these efforts to produce a modern law of treaties. In 1935, for instance, scholars at Harvard Law School

Investment Disputes,' *Kluwer Arbitration Blog* (13 Jan. 2022), available at: http://arbitrationblog.kluwerarbitration.com/2022/01/13/regime-interaction-in-investment-arbitration-looking-forward-looking-back-on-the-vienna-convention-on-the-law-of-treaties-as-a-disciplining-force-in-international-investment-disputes/ (last accessed: 22 Apr. 2022). *See also* Chapter 21 in this book.

19. *See*, *e.g.*, James T Kenny, 'Manley O. Hudson and the Harvard Research in International Law 1927-1940' (1977) 11 The Intl. Lawyer 319.
20. *See generally* 'Collaboration of the American Society of International Law with the League of Nations' Committee of Experts' (1926) 20 AJIL 1, 9 (which lists 'procedure of international conference; the drafting of treaties' alongside twenty other topics for consideration).
21. Havana Convention, in Harvard Research in International Law, (1935) 29 Am. J. Intl. L. Spec. Supp., App. 1, 1205.
22. Oliver Dörr, 'Introduction: On the Role of Treaties in the Development of International Law,' in Kirsten Schmalenbach and Oliver Dörr (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 5.

produced a 'Draft Convention on the Law of Treaties'.[23] This was a longer document, with explanatory notes, covering various topics related to the identification, entry into force, and application of treaties. The authors noted, *inter alia*, that at the time of their efforts there was 'no clear and well-defined law of treaties' and that 'the making of treaties is for the most part in the hands of persons who are not experts and whose habits lead them to seek results with little regard for legal forms'.[24]

Following World War II, the customary international law rules relevant to the negotiation, validity, and interpretation of treaties had grown into a relatively comprehensive body of rules through State practice and *opinio juris*.[25] This growing body of practice meant that the topic of treaty law elicited further interest from States, international organizations, and international law scholars and practitioners as a potential focus for codification efforts.[26]

In 1949, the ILC, at its first session, identified the law of treaties as a 'priority topic' for possible codification and clarification.[27] James L. Brierly was entrusted to serve as Special Rapporteur on the law of treaties, with his engagement as Special Rapporteur lasting from 1949 to 1952. Brierly's mandate involved reconsideration of work on predecessor projects, including on the Havana Convention referred to above.[28]

The ILC's subsequent approach and effort, which would continue for seventeen years – until 1966 – is well-documented, including through publicly available preparatory documents and photographs that have been digitized and made available in the

23. Harvard Research in Intl Law, Draft Convention on the Law of Treaties, (1935) 29 Am J. Intl L. Supp. 657.
24. Research in International Law, *Law of Treaties,* (1935) 29 AJIL Supp. 653, 666. However, others have criticized these efforts for 'reluctance' to 'provide bold rules of law (other than simply provisions on grounds of invalidity) covering substantively and procedurally the question of invalidity' of treaties. Christos L. Rozakis, 'The Law on Invalidity of Treaties' (1974) 16 Archiv Des Völkerrechts 150, 151.
25. *See* UN Audiovisual Library of International Law on the 'Vienna Convention on the Law of Treaties', available at: https://legal.un.org/avl/ha/vclt/vclt.html (last accessed: 15 Apr. 2022).
26. *See, e.g.*, Institut de Droit International, 'De l'interprétation des traités' (1950).
27. The Work of the International Law Commission, 8th ed. (Vol. I) (United Nations, 2012) 36; International Law Commission, Summary record of the 33rd plenary meeting, held on 3 Jun. 1949 (A/CN.4/SR.33), 237, para. 6, available at: https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr33.pdf (last accessed: 15 Apr. 2022). *See also* Report of the International Law Commission on the work of its first session, 12 Ap.-19 Jun. 1949 (A/CN.4/13 and Corr. 1-3) 281, paras 19-20, available at: https://legal.un.org/ilc/documentation/english/reports/a_cn4_13.pdf (last accessed: 15 Apr. 2022) ('19. Having provisionally selected fourteen topics for codification, the Commission next considered which of these should be studied first. One suggestion was that priority should be given to the question of the regime of the high seas, statelessness, and consular intercourse and immunities. Another was that the questions of the law of treaties and of arbitral procedure should be given priority. A third stressed the importance of the question of nationality and statelessness, and a fourth that of the right of asylum. 20. The Commission finally decided to give priority to the following three topics: (1) Law of treaties; (2) Arbitral procedure; (3) Regime of the high seas.').
28. International Law Commission, Summary record of the 33rd plenary meeting, held on 3 Jun. 1949 (A/CN.4/SR.33) 237, para. 7, available at: https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr33.pdf (last accessed: 15 Apr. 2022) ('The first question, that of treaties, embraced various familiar problems which the Rapporteur would naturally consider in the light of the existing documents, including the "Convention on Treaties" adopted in 1928 by the Havana Conference.').

UN's Audiovisual Library.[29] These materials provide a snapshot into the various meetings of the ILC which ultimately led to the VCLT.[30] But even this digital archive simplifies the complexity and magnitude of the task faced by the ILC.

The first task for the ILC, with respect to the law of treaties as well as the other two 'priority' topics, was to seek from governments relevant 'texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents'.[31] By March 1950, the replies from some governments to the ILC's initial questionnaires had begun to be collated and considered.[32] Further governmental responses would continue to be provided to the ILC on a rolling basis.

Brierly's first report in April 1950 provided a 'Draft Convention on the Law of Treaties' that was set out in three chapters and notably included a definition of 'treaty' and addressed, among other things, States' capacity to make treaties and how such treaties may be authenticated and accepted, and their entry into force.[33] Brierly noted that further chapters to address additional topics would be added in due course. In particular, he envisaged that future chapters dealing with interpretation and termination of treaties were necessary.[34] He also noted at the outset that his first challenge was to determine the best approach to guide his work:

> The draftsman of a code of the law of treaties is confronted immediately upon taking up his task with the problem inherent in all work of codification: whether to confine his attention strictly to the law as it may be generally acknowledged to be, or whether to suggest what are in his view improvements in the existing law. The problem appears the more acute in connexion with the special topic of treaties for a reason connected with the nature of that topic. For the principal problems

29. *See* UN Audiovisual Library of International Law on the 'Vienna Convention on the Law of Treaties', available at: https://legal.un.org/avl/ha/vclt/vclt.html (last accessed: 15 Apr. 2022).
30. *See ibid.*
31. Report of the International Law Commission on the work of its first session, 12 Apr.-19 Jun. 1949 (A/CN.4/13 and Corr. 1-3) 281, para. 22, available at: https://legal.un.org/ilc/documentation/english/reports/a_cn4_13.pdf (last accessed: 15 Apr. 2022).
32. Replies from Governments to Questionnaires of the International Law Commission, Second session of the International Law Commission (A/CN.4/19, 23 Mar. 1950), available at: https://legal.un.org/ilc/documentation/english/a_cn4_19_treaties.pdf (last accessed: 15 Apr. 2022). Among the first respondents to the ILC's questionnaire were Canada, Costa Rica, Denmark, France, Israel, Netherlands, Philippines, Poland, Union of South Africa, the United States, and the United Kingdom. *Ibid.* at 196. Interestingly, the United States noted that '[a] considerable amount of material with respect to the law of treaties so far as the United States is concerned is presently available in published form. Material on the subject for the period generally from 1789 to 1906 is published in Chapter XVII of John Bassett Moore's International Law Digest, volume V, pages 155-387 (Washington, Government Printing Office, 1906). For the period 1906 to 1943, material on the subject is published in Chapter XVI of Green Haywood Hackworth's Digest of International Law, volume V, pages 1-433 (Washington, Government Printing Office, 1943)'.) *Ibid.* at 221, section 11.
33. International Law Commission, Report on the Law of Treaties, by James L. Brierly, Special Rapporteur (A/CN.4/23, 14 Apr. 1950), available at: https://legal.un.org/ilc/documentation/english/a_cn4_23.pdf (last accessed: 15 Apr. 2022). Brierly noted that his draft built upon the work of prior initiatives. *Ibid.* at 225, para. 8.
34. *Ibid.* at 224, para. 1 ('It is intended that further chapters should be added. These must deal, it is clear, with the interpretation of treaties and with their termination. And it will be a matter for further consideration whether or not there ought to be also a chapter, which would follow Chapter III, on what may be termed the obligation or effect of treaties.').

> which arise in practice in connexion with treaties are due not so much to any degree of doubt or dispute as to what the general rules of law applicable may be, but rather to the infinitely various application of those rules in fact.[35]

He presented the respective merits of several approaches and determined that his mandate and the existing status of the law required him to:

> confine the process of codification to the expression of such broad propositions of existing law as that 'In the absence of an agreement upon procedure which dispenses with the necessity for signature, a treaty must be signed on behalf of each of the States concluding it'[36]

From here, Brierly's work continued in an iterative fashion. In April 1951, he issued his second report, incorporating revisions to various articles of the proposed draft convention.[37] Importantly, his comments on the various draft articles identified with considerable precision the prior efforts that he was seeking to build upon in his development of the draft text.[38] In April 1952, Brierly issued his third and final report with further refined and expanded articles.[39]

Following Brierly's resignation as Special Rapporteur, Sir Hersch Lauterpacht was appointed as the second Special Rapporteur to lead the ILC's work on the law of treaties.[40] By the time Sir Hersch issued his first report in March 1953, the scope of the draft articles had expanded further and also incorporated proposed alternative formulations of text. Sir Hersch noted that:

> The present Report is intended primarily as a formulation of existing law. It is largely for this reason that the Special Rapporteur has thought it necessary in a number of cases – as, for instance, in the case of article 9 relating to reservations – to append alternative formulations de lege ferenda. In some cases it has been thought necessary to include, for the consideration of the Commission, alternative formulations of lex lata. However, in general the Special Rapporteur has attached importance to the preservation of the distinction between the two main tasks which, in relation to this and other topics, confront the Commission – namely, those of codification and development of international law.[41]

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35. *Ibid.*, para. 2.
36. *Ibid.* at 224, para. 3; *see also generally* 224-225, paras 3-6.
37. *See generally* International Law Commission, Second Report on the Law of Treaties: Revised articles of the draft convention, by Mr James L. Brierly, Special Rapporteur (A/CN.4/43, 10 Apr. 1951), available at: https://legal.un.org/ilc/documentation/english/a_cn4_43.pdf (last accessed: 15 Apr. 2022).
38. *Ibid. See, e.g.*, Comment to draft Art. 5 ('This article with minor drafting alterations follows article 10 of the Harvard Draft.') *Ibid.* at 72.
39. *See generally* International Law Commission, Third Report on the Law of Treaties – Articles tentatively adopted by the commission at the third session with commentary thereon, by Mr J.L. Brierly, Special Rapporteur (A/CN.4/54 and Corr. 1, 10 Apr. 1952), available at: https://legal.un.org/ilc/documentation/english/a_cn4_54.pdf (last accessed: 15 Apr. 2022).
40. Report of the International Law Commission on the work of its fourth session, 4 Jun.-8 Aug. 1952 (A/2456), 59 at para. 51, available at: https://legal.un.org/ilc/documentation/english/reports/a_cn4_58.pdf (last accessed: 15 Apr. 2022).
41. International Law Commission, Report on the Law of Treaties, by Mr H. Lauterpacht, Special Rapporteur (A/CN.4/63, 24 Mar. 1953) 90, para. 3, available at: https://legal.un.org/ilc/documentation/english/a_cn4_63.pdf (last accessed: 15 Apr. 2022).

Sir Hersch's second report in July 1954 not only presented new articles for consideration, regarding the operation and implementation of treaties, but also presented a further report supplementing and modifying some aspects of his March 1953 report.[42]

In 1955, Sir Gerald G. Fitzmaurice was selected as the ILC's third Special Rapporteur on the law of treaties.[43] Sir Gerald explained in his first report, in March 1956, that his initial task 'was to decide whether to adopt the work of his distinguished predecessors, so far as this had proceeded, and to take the subject up at the point where they left off, or whether to review once more the topics covered by this earlier work'.[44] He explained that his own preference would have been to continue advancing his predecessors' work,[45] but certain ILC members had raised the merits of revisiting the draft articles prepared by Brierly and Sir Hersch with an aim of synthesizing those prior efforts because of the various differences that had emerged due to the different approaches of the two prior Special Rapporteurs.[46]

This exercise led Sir Gerald to observe that, while his predecessors had developed a comprehensive body of commentary in support of their work, the draft articles were both few in number and of a 'general' nature.[47] Following this realization, he questioned 'how specialized a code should be – a question not easily answered in the case of a topic such as the conclusion of treaties, where often no entirely clear dividing line can be drawn between what are matters of strict law, and what are matters of practice, common usage, or protocol'.[48] Sir Gerald concluded that 'a code on the law of treaties should deal with at any rate the more prominent of these points, without, on the other hand, going too far into what are fundamentally matters of practice that do not raise strictly legal issues'.[49] He thus focused his draft articles on the framing and conclusion of treaties, alongside some basic principles of treaty law.[50] Throughout his work, he acknowledged the valuable contributions of his predecessors.[51]

Importantly, Sir Gerald had clear views that the fruits of his efforts should be a 'code' and not a 'draft convention'. As noted in the report of the ILC's eleventh session

42. International Law Commission, Second Report on the Law of Treaties, by Mr H. Lauterpacht, Special Rapporteur (A/CN.4/87 and Corr. 1, 8 Jul. 1954) 123, Introduction, available at: https://legal.un.org/ilc/documentation/english/a_cn4_87.pdf (last accessed: 15 Apr. 2022).
43. Report of the International Law Commission on the work of its seventh session, 2 May-8 Jul. 1955 (A/2934) 42, para. 32, available at: https://legal.un.org/ilc/documentation/english/reports/a_cn4_94.pdf (last accessed: 15 Apr. 2022).
44. International Law Commission, Report on the Law of Treaties, by Mr G.G. Fitzmaurice, Special Rapporteur (A/CN.4/101, 14 Mar. 1956) 105, para. 1, available at: https://legal.un.org/ilc/documentation/english/a_cn4_101.pdf (last accessed: 15 Apr. 2022).
45. *Ibid.* at 105, para. 2.
46. *Ibid.*
47. *Ibid.* at 105-106, paras 2-3.
48. *Ibid.* at 106, para. 4.
49. *Ibid.*
50. *Ibid.*, at 106, para. 5.
51. *Ibid.* at 106, para. 6 ('On the other hand, if the present Rapporteur has felt obliged to expand the articles, the work done by his predecessors, especially Sir Hersch Lauterpacht, has enabled him greatly to reduce the commentary that might otherwise have been called for. He has avoided repetition, and has confined himself to commenting on new points, or points that may be thought to be doubtful or especially controversial.').

in June 1959 – ten years into its work – Sir Gerald envisaged that the ILC's work on the law of treaties could 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.[52]

This approach was premised on the view that 'the *law* of treaties is not itself dependent on a treaty, but is part of general customary international law'.[53]

The vision for the ultimate form of the ILC's output on the law of treaties only crystallized with the work of the fourth and final Special Rapporteur on the law of treaties, Sir Humphrey Waldock. Appointed in 1961, Sir Humphrey focussed on the preparation of draft articles capable of serving as a basis for an international convention. This followed from a debate at the 620th and 621st meetings of the ILC, at which it was decided:

> (i) That its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention;
> (ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its special rapporteurs;
> (iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years.[54]

Over the next five years, Sir Humphrey generated six reports. He built upon his predecessors' significant work and quickly developed momentum towards what would become the VCLT. His first report in March 1962 explained:

52. *Ibid.* at 106-107, para. 9 (emphasis in original). *See also* Report of the International Law Commission covering the work of its eleventh session, 20 Apr.-26 Jun. 1959 (A/4169), para. 18, available at: https://digitallibrary.un.org/record/715788?ln=en (last accessed: 25 Apr. 2022) ('the Commission has not at present envisaged its work on the law of treaties as taking the form of one or more international conventions or as taking the form of a treaty, but rather as a code of a general character'.).
53. *Ibid*. (emphasis in original).
54. Report of the International Law Commission on the work of its thirteenth session, 1 May-7 Jul. 1961 (A/4843) 128, para. 39 available at: https://legal.un.org/ilc/documentation/english/reports/a_cn4_141.pdf (last accessed: 15 Apr. 2022).

> The Special Rapporteur, in accordance with the Commission's decision, has aimed at preparing a group of draft articles which might provide the basis for a convention on the 'conclusion' of treaties. 'Entry into force' has been regarded as naturally associated with, if not actually part of, 'conclusion', while the subject of 'registration of treaties' has been added as belonging essentially to the procedure of treaty-making and as being closely linked in point of time to entry into force. It is believed that, if the Commission finds it possible to reach a wide measure of agreement upon draft articles covering these three topics, they will furnish the basis either for a self-contained convention on the 'conclusion, entry into force and registration of treaties' or for a separate chapter in a larger convention covering the whole or a large part of the law of treaties.[55]

Within a year, the ILC requested that the UN Secretariat prepare a memorandum, in the form of 'Resolutions of the General Assembly,' that reproduced the decisions taken on the law of treaties.[56] This draft was submitted by the UN Secretary-General to governments to elicit their observations on the text.[57] Meanwhile, Sir Humphrey was delegated to address additional topics, namely the validity, duration, and termination of treaties.[58] His findings were reflected in his second report which was issued in 1963.[59]

Sir Humphrey's third report, issued in 1964, drew attention to a number of compelling issues of treaty law that are especially relevant today. The report focussed on the application, interpretation, and effects of treaties.[60] None of these topics was previously given significant consideration by the ILC.[61] Sir Humphrey observed that the effects of treaties on third States and the application of conflicting treaties were topics that properly should be considered alongside the revision of treaties.[62] This subject had not previously been assigned to any 'specific place' in the law of treaties by the ILC, so he took it upon himself to develop a section for it.[63] Meanwhile, the revision and interpretation of treaties – which were acknowledged as important topics by prior Special Rapporteurs during the course of their work – had not been the subject of prior

55. International Law Commission, First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/144 and Add.1, 26 Mar. 1962) 30, para. 8, available at: https://legal.un.org/ilc/documentation/english/a_cn4_144.pdf (last accessed: 15 Apr. 2022).
56. International Law Commission, Memorandum prepared by the Secretariat, 'Resolutions of the General Assembly concerning the Law of Treaties' (A/CN.4/154, 14 Feb. 1963) 2, available at: https://legal.un.org/ilc/documentation/english/a_cn4_154.pdf (last accessed: 15 Apr. 2022).
57. International Law Commission, Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/156 and Add. 1-3, 20 Mar., 10 Apr., 30 Apr. and 5 Jun. 1963) 38, para. 1, available at: https://legal.un.org/ilc/documentation/english/a_cn4_156.pdf (last accessed: 15 Apr. 2022).
58. *Ibid.* at 38, para. 5.
59. *Ibid.*
60. International Law Commission, Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add. 1-3, 3 Mar., 9 Jun., 12 Jun. and 7 Jul. 1964) 6, available at: https://legal.un.org/ilc/documentation/english/a_cn4_167.pdf (last accessed: 15 Apr. 2022).
61. *Ibid.* at 6, paras 2-4.
62. *Ibid.* at 6, para. 2.
63. *Ibid.*

reports to the ILC.[64] Finally, the topic of application of treaties had been the subject of two reports by Sir Gerald, but time constraints prevented the ILC from taking up the topic in detail.[65] Sir Humphrey accordingly prepared draft articles on each of these topics for consideration by the ILC.

Having reached some consensus, the ILC continued to review and refine the draft articles on the law of treaties. It focussed on the title for each subsection and the general sequence of articles, while also incorporating feedback from governments on the contents of the provisions themselves.[66] Ultimately, in 1966, the ILC submitted a final draft to the UN General Assembly and recommended that it convene an international conference to conclude a convention on the subject.[67]

By Resolution 2166 (XXI) of 5 December 1966, the UN General Assembly endorsed the recommendation made by the ILC in principle and in the following year decided to convene the Vienna Conference in 1968 and 1969.[68] This resulted, of course, in the VCLT. The UN Audiovisual Library reports that the conference underlying the VCLT was the 'last great codification conference' that employed a majority-rules voting method.[69] As Karl Zemanek explains:

> The final text of the convention was accepted by 79 votes to 1, with 19 abstentions. This 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.[70]

64. *Ibid.* at 6, para. 3 ('The revision and the interpretation of treaties are topics which have not been the subject of reports by any of the Commission's three previous Special Rapporteurs on the law of treaties.').
65. *Ibid.* ('The topic of the application of treaties, on the other hand, was the subject of a full study by Sir Gerald Fitzmaurice in his fourth and fifth reports in 1959 and I960. However, owing to the pressure of other work the Commission was not then able to take up its examination of those reports. The Special Rapporteur has naturally given full consideration to those reports in drafting the articles on the application of treaties now submitted to the Commission.').
66. *See, e.g.*, International Law Commission, Fifth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/183 and Add. 1-4, respectively 15 Nov. 1965, 4 Dec. 1965, 20 Dec. 1965, 3 Jan. 1966 and 18 Jan. 1966) 2-4, at paras 4-11, available at: https://legal.un.org/ilc/documentation/english/a_cn4_183.pdf (last accessed: 15 Apr. 2022).
67. Report of the International Law Commission on the second part of its seventeenth session, 3-28 Jan. 1966, and on its eighteenth session 4 May-19 Jul. 1966. Adoption of the draft articles, with commentaries (A/6309/Rev.1) 177, paras 36-38, available at: https://legal.un.org/ilc/documentation/english/reports/a_cn4_191.pdf (last accessed: 15 Apr. 2022).
68. Resolution 2166 (XXI) on an International Conference the Law of Treaties, available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2166(XXI) (last accessed: 15 Apr. 2022); Resolution 2287(XXII) on a United Nations Conference on the Law of Treaties, available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2287(XXII) (last accessed: 15 Apr. 2022).
69. Karl Zemanek, 'Vienna Convention on the Law of Treaties: Introductory Note,' available at: https://legal.un.org/avl/ha/vclt/vclt.html (last accessed: 15 Apr. 2022).
70. *Ibid.*

As of 23 May 1969, following two decades of the law of treaties remaining on the ILC's agenda, the VCLT was opened for signature. For original parties, it would enter into force a further eleven years later, on 27 January 1980.[71]

§1.03 THE SCOPE AND FOCUS OF THE VCLT

As adopted at the Vienna Conference, the VCLT addresses a range of topics that are fundamental to the law of treaties. The VCLT applies to 'treaties' and supplies rules and guidance concerning their existence and effect.

The concept of a 'treaty' had been long debated in international circles. Judge Philip Jessup, for instance, observed in 1962 that '[t]he notion that there is a clear and ordinary meaning of the word "treaty" is a mirage'.[72] The VCLT adopts a specific definition of the instruments to which it applies, defining the concept of 'treaty' 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.[73]

This definition of 'treaties' is specific to the VCLT: different, wider, definitions may apply in other regimes, including under customary international law. When assessing whether a given instrument is a 'treaty' for the purposes of Article 2(1)(a), international tribunals have typically focussed on whether the instrument is in writing and intended to create legal obligations governed by international law.[74] The VCLT as a matter of treaty law applies only to such instruments where they have been concluded by States that are themselves also party to the VCLT. The VCLT is moreover non-retroactive and only applies to treaties concluded after its entry into force (i.e., 27 January 1980 for original parties).[75]

It is worth noting that the VCLT is never applied alone. Rather, it is always applied in conjunction with another treaty because it provides a framework of canons,

71. While this book focuses on the VCLT's success and momentum, the VCLT was subject to some criticism shortly after its entry into force, in part, because commentators did not think the VCLT entered into force with broad enough support from States, thereby limiting its potential utility. *See, e.g.*, E.W. Vierdag, 'The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention' (1982) 76(4) AJIL 779. However, today, any such critiques are less persuasive as the VCLT has been broadly ratified and, as discussed in section 1.04, it is widely accepted as a reflection of customary international law.
72. *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment (Separate Opinion, Judge Philip Jessup), ICJ Rep. 1962 (21 Dec.) 402.
73. VCLT, Art. 2(1)(a).
74. *See, e.g.*, Malgosia Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations Between States in International Law' (2002) 73(1) BYIL 141, 141. *See* the book's Appendix for a summary of investor-State arbitral practice on this point, including a table recording references to the VCLT in over 350 different procedural orders, decisions and awards of investor-State arbitral tribunals.
75. *See generally* Shabtai Rosenne, 'The Temporal Application of the Vienna Convention on the Law of Treaties' (1970) 4(1) Cornell Intl. L. 1.

rules, and tools to assess and resolve key issues related to the operation, meaning and effect of international treaties. Thus, in the international investment law arena, the VCLT is typically applied in conjunction with the relevant IIA that is to be interpreted and applied. While IIAs squarely fall within the scope of the VCLT's definition of 'treaty', whether the VCLT applies will, in part, depend on the temporal relationship between the VCLT's entry into force for the relevant State party and the entry into force of the IIA at issue. However, as elaborated in section 1.04 below, the VCLT's rules may nonetheless be applied to an IIA as a reflection of customary international law. This has also meant that the VCLT has come to play a role in the application of other associated instruments relevant to international investment disputes, including the ICSID and New York Conventions.[76] The VCLT's broad influence is moreover not limited only to international law. The VCLT's rules and canons may be usefully applied and have on occasion been so applied, by analogy and comparison, to the interpretation of contracts or domestic law statutes.[77]

The VCLT applies only to treaties concluded between States. This limitation on the scope of the VCLT was the subject of significant discussion at the ILC.[78] In 1956, for instance, 'the question of whether the code should cover treaties made by and with international organizations' arose, with the 'general feeling of the Commission' supporting such coverage.[79] It was nevertheless determined that the law applicable to such treaties 'was relatively young', and it was proposed therefore that the draft should refer to treaties among States only, with the potential for a 'special section' on the law applicable to other treaties being left open.[80]

Subsequent (and less widely ratified instruments) have since been developed to apply to treaties between States and other subjects of international law (e.g., international organizations). In particular, following further work by the ILC, on 21 March 1986, the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLTIO) was opened for signature.[81] The VCLTIO is widely accepted as an extension and reflection of the VCLT and some commentators have referred to its launch as 'déjà vu'.[82]

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76. *See*, for example, Chapter 18 in this book (discussing challenges resulting from the interpretation and application of the New York Convention by domestic court judges, and the ways in which the VCLT may support harmonization of approaches).
77. *See*, for example, the book's Appendix, which provides a summary of investor-State arbitral practice on this point, including a table recording references to the VCLT in over 350 different procedural orders, decisions and awards of investor-State arbitral tribunals.
78. *See generally* International Law Commission, Report on the Law of Treaties, by Mr G.G. Fitzmaurice, Special Rapporteur (A/CN.4/101, 14 Mar. 1956) para. 11, available at: https://legal.un.org/ilc/documentation/english/a_cn4_101.pdf (last accessed: 15 Apr. 2022).
79. International Law Commission, Summary records of the 368th to 370th plenary meetings, held from 15-19 Jun. 1956 (A/CN.4/SR.368-370) para. 12, available at: https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr370.pdf (last accessed: 15 Apr. 2022).
80. *Ibid.*
81. VCLTIO, UN Doc. A/CONF.129/15, 21 Mar. 1986, which has forty-five Contracting Parties (of which thirty-three are States) and thirty-nine further signatories. *See* UN Treaty Collection, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en#1 (last accessed: 15 Apr. 2022).
82. Giorgio Gaja, 'A "New" Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary' (1987) 58(1)

Substantively, the VCLT provides rules and canons to guide engagement with treaties (Part I). It provides 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); among further articles dealing with additional matters, including state succession, the impact on diplomatic and consular relations, the depositary of a treaty, and notification, communication, and correction (Parts VI and VII). The various parts of this book engage with several of the VCLT's rules on these topics to highlight their relevance and role in investment law and ISDS, including historical practice and future opportunities.

§1.04 THE VCLT AS A REFLECTION OF CUSTOMARY INTERNATIONAL LAW

Customary international law is not a centralized or written corpus of law. Rather, a principle or rule may gain the status of customary international law when twin factors are satisfied: first, the principle must be widely and consistently reflective of State practice, and second, States must believe that there is a legal obligation incumbent upon them to uphold the principle, giving rise to *opinio juris* ('a belief in legal obligation').[83]

Section 1.02 above brought into focus the ILC's intent to design a codification of the law of treaties that reflected existing custom – a process that unfolded over the course of seventeen years. Karl Zemanek suggests that the VCLT's crowning achievement was not to develop a law on treaties, but rather to give 'incoherent material', that already existed in State practice, 'a systemic structure'.[84] This is also reflected in the VCLT's negotiation history. Preparations towards a law of treaties gained momentum at the ILC during Sir Humphrey's tenure as Special Rapporteur, and thereafter a strong and comprehensive text was developed. From there, it was a fairly straightforward path – with limited government resistance to its substantive articles – to gain the UN General Assembly's endorsement for the Vienna Conference to be held in 1968 and 1969.

As of April 2022, the VCLT has been ratified by 116 States and signed by 45 others.[85] However, some of the VCLT's rules, canons, and tools enjoy even broader

BYIL 253, 253-254 (while commenting on the structure and approach of the VCLTIO, Gaja explained '[t]he newly adopted text gives the reader a strong feeling of déjà vu'.).

83. Christopher John Greenwood, 'Sources of International Law: An Introduction,' available at: https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf (2008) (last accessed: 15 Apr. 2022) ('Customary law is not a written source. A rule of customary law, e.g., requiring States to grant immunity to a visiting Head of State, is said to have two elements. First, there must be widespread and consistent State practice – i.e., States must, in general, have a practice of according immunity to a visiting Head of State. Secondly, there has to be what is called "*opinio juris*", usually translated as "a belief in legal obligation; i.e., States must accord immunity because they believe they have a legal duty to do so".').
84. Karl Zemanek, 'Vienna Convention on the Law of Treaties: Introductory Note,' available at: https://legal.un.org/avl/ha/vclt/vclt.html (last accessed: 15 Apr. 2022).
85. *See* United Nations Treaty Collection entry on VCLT, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src = TREATY&mtdsg_no = XXIII-1&chapter = 23&Temp = mtdsg3&clang

application as a reflection of customary international law. Some non-ratifying States have directly stated that they recognize parts of the VCLT as a reflection of customary international law. The United States, for example, explains its position in a Q&A section on the website of the US Department of State:

> Is the United States a party to the Vienna Convention on the Law of Treaties?
>
> No. The United States signed the treaty on April 24, 1970. The U.S. Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.[86]

While not all of the VCLT reflects customary international law, certain provisions have been emphatically and consistently recognized as reflective of customary international law including, prominently, the rules on the interpretation of treaties embodied in Articles 31 through 33.[87] This view is reflected in the practice of international investment tribunals. For example, in *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, the tribunal matter-of-factly noted that interpretation of the applicable treaty 'must be conducted in accordance with the law of treaties … and in particular in Articles 31-33 of the VCLT, which are familiar to all involved in investment arbitration'.[88] Similarly, in *Saluka Investments v. Czech Republic*, the tribunal noted that the rules on treaty interpretation in the VCLT were 'binding upon the Contracting Parties to the Treaty, and also represent customary international law'.[89] International investment tribunals also will often employ the VCLT's rules (including the interpretive rules in Articles 31 through 33) as a reflection of customary international law to resolve disputes to which the VCLT would otherwise not apply as a matter of treaty law (e.g., because the relevant IIA entered into force prior to the VCLT's entry into force between the States parties).[90]

=_en (last accessed: 13 Apr. 2022). Taiwan signed the VCLT on 27 Apr. 1970 behalf of the Republic of China (ROC), however, its signature was objected to by several UN Member States that do not recognize the ROC. When the People's Republic of China subsequently acceded to the VCLT it declared that '[t]he signature to the said Convention by the Taiwan authorities on 27 Apr. 1970 in the name of "China" is illegal and therefore null and void'. *See ibid.* entry on China and n. 4.

86. *See, e.g.*, 'U.S. Department of State: Frequently Asked Questions: Vienna Convention on the Law of Treaties' (2009-2017 archived webpage), available at: https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm (last accessed: 13 Apr. 2022). As explained in the United States' submission to a NAFTA arbitral tribunal under UNCITRAL Rules: '[a]lthough the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the "authoritative guide to treaty law and practice."' *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Submission of the United States, 24 Aug. 2021, n. 60 (quoting Letter from Secretary of State Rodgers to President Nixon transmitting the Vienna Convention on the Law of Treaties, 92d Cong., 1st Sess. at 1 (18 Oct. 1971)).
87. *See, e.g.*, Richard Gardiner, *Part II Interpretation Applying the Vienna Convention on the Law of Treaties*, Treaty Interpretation, 2nd ed. 163-164 (OUP 2015).
88. *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, Decision on Jurisdiction, 24 Oct. 2011 (ICSID Case No. ARB/07/31), para. 26.
89. *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006, para. 296.
90. *See* further the book's Appendix, which provides a summary of investor-State arbitral practice on this point, including a table recording references to the VCLT in over 350 different procedural orders, decisions and awards of investor-State arbitral tribunals.

International investment tribunals have recognized that other provisions of the VCLT reflect customary international law, including the Article 26 principle of *pacta sunt servanda*,[91] the Article 27 rule on internal law,[92] the Article 28 principle of non-retroactivity,[93] Article 29 on the territorial effect of treaties,[94] and the principles on third-party rights and obligations in Articles 34 through 36.[95] Additional examples to this effect are noted in the case table included as the Appendix in this book.

Collectively, these uses and statements demonstrate that even if the VCLT does not apply to a particular instrument (e.g., because the instrument in question is not a 'treaty' within the meaning of Article 2 of the VCLT, or because it is a treaty concluded prior to the VCLT's entry into force for the respective State), many provisions of the VCLT would be accepted as a reflection customary international law and apply regardless. Certain limitations may nevertheless arise to the extent that the VCLT is applied as a matter of customary, rather than treaty, law. The procedural rules contained in certain provisions of the VCLT, for instance, have tended to attract a less settled status as reflective of customary rules. This may mean that while a substantive rule, for example, related to treaty termination or amendment, might be held to bind a State as a matter of customary international law, the notification or procedural requirements for exercising the right of termination or amendment specified in the VCLT may not. International investment tribunals have as yet rarely grappled expressly with such potential complexities. Despite these caveats, the recognition of many of the provisions of the VCLT as reflective of customary international law undoubtedly expands its scope and impact.

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91. *See, e.g., Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. and the Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 Apr. 2015, para. 24 ('In its Decision on Liability, the Tribunal determined that the Respondent failed to comply with its treaty obligation to accord fair and equitable treatment to the investments of the Claimants. Pursuant to Article 26 (Pacta Sunt Servanda) of the Vienna Convention on the Law of Treaties, a provision that embodies a fundamental principle of customary international law, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".').
92. *See, e.g., Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 Nov. 2015, n. 65 (the Committee observed that Arts 27 and 46 of the VCLT 'codify existing customary international law').
93. *See, e.g., Ping An Life Insurance Company of China, Limited et al. v. Kingdom of Belgium,* ICSID Case No. ARB/12/29, Award, 30 Apr. 2015, para. 135 ('The applicability of the 1986 BIT to the substance of the claim flows from the principle of non-retroactivity: Vienna Convention, Article 28 … ').
94. *See, e.g., Sanum Investments Limited v. Lao People's Democratic Republic I*, PCA Case No. 2013-13, Award on Jurisdiction, 13 Dec. 2013, para. 220 ('It is undisputed by the Parties that Article 29 in its entirety has the force of binding customary international law. As this is not controversial the Tribunal does not consider that it needs to make lengthy developments to support this statement of law.').
95. *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 Mar. 2002, para. 23 ('Under Articles 34, 35 and 36 of the Vienna Convention on the Law of Treaties 1969 (United Nations, Treaty Series, Vol. 1155, p. 331), *pacta tertiis nec nocent nec prosunt.* Treaties neither harm nor benefit non-Parties. The ICSID Convention, to which Canada is not a Party, could not be invoked by Canada, nor by a national or company of Canada, such as Mihaly (Canada). This principle was admitted by the Parties at the Hearing.').

In any case, some States now expressly are recognizing the importance and potential utility of the VCLT for resolving the many difficult issues of treaty law that might arise in investment disputes. Whereas historically the VCLT has been applied by international investment tribunals on the basis that the law applicable to the dispute is international law,[96] some States now expressly are directing investment tribunals to apply the VCLT by including directions to this effect in their IIAs. For example, the bilateral investment treaty concluded in 2020 between Hungary and Kyrgyzstan provides in Article 9(7) as follows:

> When rendering its decision, the tribunal shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties… .[97]

The inclusion of such provisions in IIAs will provide greater opportunities for international investment tribunals to use and elaborate the VCLT's rules. Coupled with the likely continued accumulation of arbitral awards and decisions engaging with the VCLT, they may also produce in time recognition that further provisions of the VCLT also reflect an evolving customary international law on treaties.

§1.05 THE INFLUENCE OF THE VCLT IN INVESTOR-STATE DISPUTES

In December 2019, to celebrate the fiftieth anniversary since the VCLT was opened for signature and the upcoming fortieth anniversary of its entry into force in 2020, the editors of this book convened a week-long series of blog posts on *Kluwer Arbitration Blog*, focusing on the VCLT's history, evolution, and future.[98] Engaging in that process made it clear that a broader array of topics relevant to these themes could be explored in much greater depth. This book thus expands upon that series and develops upon the

96. *See, e.g.*, *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 Jun. 2020, para. 257 ('A treaty is not an empty vessel with no governing law whatsoever, until some is assigned to it through resort to the default rules of a particular dispute resolution mechanism. Under the very definition of a treaty provided by Article 2(1)(a) of the VCLT, a treaty is "an international agreement concluded between States in written form and governed by international law …". In other words, the starting proposition for any treaty is that, by virtue of entering into that arrangement, its Contracting States have agreed that it shall be interpreted by reference not only to its terms (on which those States have expressly agreed), but also by reference to general principles of international law (on which those States have implicitly agreed). … If the Contracting Parties do not wish to add other elements to the implicit applicable law arising from the VCLT, they do not need to include an express applicable law provision, although of course they may choose to do so for avoidance of doubt. The fact that they do not include any express clause does not, however, connote that the Contracting States had no shared understanding at all regarding the issue. It certainly does not connote that they had a shared intention to depart from the basic VCLT proposition that treaties are governed by their express terms and by reference to general principles of international law.').
97. Hungary-Kyrgyzstan BIT 2020, Art. 9(7).
98. Esmé Shirlow and Kiran Nasir Gore (eds), 'Celebrating 50 Years of the VCLT', *Kluwer Arbitration Blog* (2-8 Dec. 2019), available at: http://arbitrationblog.kluwerarbitration.com/category/vclt-jubilee/ (last accessed: 13 Apr. 2022).

analysis initially included in the blog series. It is fortuitous that its publication in 2022 coincides with the ILC's seventy-fifth anniversary.

This book engages the nexus between the VCLT, international investment law, and ISDS. It considers the VCLT's interpretive tools, the VCLT's guidance on the creation and application of treaties, and how the VCLT has informed State practice with respect to the entry into, exit from, and amendment of IIAs. It concludes by examining the role that the VCLT may play in addressing next-generation and emerging challenges as international investment law and ISDS face a current crossroads and likely future evolution.

Part I commences with an examination of the VCLT's role in the interpretation of treaties. The VCLT's interpretive tools, embodied in Articles 31 through 33, are particularly well-known and as such are often the focus of analysis by scholars, international investment tribunals and practitioners given their central role in the interpretation of IIAs and related instruments. Given the extensive literature that has already emerged in relation to the uses of Articles 31 through 33 in investment treaty disputes, this book focuses on particularly thorny issues to demonstrate the challenges of putting those rules into action.

Part II then turns to the VCLT's role in the creation and application of treaties. These chapters primarily consider the VCLT's role in addressing practical challenges relating to the entry into force of IIAs, as well as their territorial and temporal scope. Although these topics have been less frequently explored in scholarship and practice, they are highly topical and relevant for investor-State disputes and investment law generally relating as they do to practical challenges – for which the VCLT presents useful guidance.

Many conversations surrounding international investment law and ISDS are presently centred on reform initiatives. Part III engages with these proposals. It starts with a focus on the termination and amendment of IIAs in order to bring into focus the role of the VCLT in relation to ongoing efforts to better align the patchwork system of IIAs with States' foreign direct investment and regulatory goals. It then considers the impact of emerging developments in Europe and current efforts to remove the possibility of intra-EU investment treaty disputes on the part of the EU. It also closely examines two of the most institutionally significant proposals presently under consideration as part of reform discussions: the possibility of creating a multilateral investment court and/or an appellate mechanism. Throughout, the focus remains on how the VCLT may interact with such initiatives.

Part IV looks to the future. It considers the VCLT as it relates to emerging concerns over the fragmentation of international investment law. In particular, it examines fragmentation challenges arising from how the VCLT is invoked by national court judges in the context of the New York Convention, an international treaty that is primarily interpreted and applied by national court judges who may have limited familiarity with international law principles (and the VCLT). It then analyses the role of the VCLT vis-à-vis treaty conflicts and *lex specialis*. A forward-looking concluding chapter explores, among other topics, how data analytics, machine learning, and related digital and data-driven tools could usefully be employed to support the

conclusion, interpretation, application, and even the design of treaties, by reference to the guiding light of the VCLT.

Finally, this book includes several features to enhance its practical utility. In particular, the book's Appendix provides a summary of investor-State arbitral practice relating to the VCLT, including a table recording references to the VCLT in over 350 different procedural orders, decisions, and awards of investor-State arbitral tribunals. The table is organized around each of the individual VCLT Articles, with references to the VCLT by arbitral tribunals noted in chronological order with a brief description of the focus of the reference or application along with pinpoint citations. The book also includes tables that collate the various primary source materials cited throughout its chapters, including a table of cited cases and a table of cited international conventions, treaties, and instruments, as well as national materials.

The chapters within each part have been authored by a diverse set of scholars and practitioners from around the world. Although each contributor brings a unique perspective to the theme, the chapters collectively support the goals of this book. Such goals are fourfold. First, to celebrate the legacy of the VCLT as an important instrument of public international law. Second, to provide guidance drawn from arbitral analyses of the VCLT canons, including those related to the negotiation, entry into force, interpretation, application, and termination of investment treaties. Third, to look ahead to the future to identify the role of, and guidance that might be drawn from, the VCLT in investor-State disputes given the likely tensions and evolutions in treaty law that will impact international arbitration into the future. Finally, to achieve each of these goals from a practical perspective. As each of the chapters demonstrates, the VCLT has often played a pivotal role in the resolution of a range of issues that arise in investment treaty practice and ISDS proceedings and its impact is thus not just theoretical but very real. This book aims to bring into the spotlight the central role that the VCLT has played in the resolution of investment disputes and to highlight how it might be most effectively invoked into the future.