

The Fragmentation/Bifurcation of International Economic Law: The Doctrine of Legal Convergence to the Rescue

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Abstract: *International Economic Law, especially looking at the regimes of trade and investment for example, is not bereft of the fragmentation occurring in international law. The separation of trade and investment has both historical and economic undertones, which eventually led to the development of bifurcation in the legal regimes that regulate them.¹ So international law manages trade and investment independent of each other. Take for example the foreign investment regime today with over 3,324 treaties agreed upon between States, out of which 2,958 are Bilateral Investment Treaties (BITs) and 367 are other treaties with investment provisions.² Developed, capital exporting states conclude International Investment Agreements (IIAs) mainly for the protection of foreign investment. It is evident that interpretation of treaties, taking for example the interpretation of the principle of non-discrimination in trade and investment treaties has been at best inconsistent, especially in investment treaty arbitration. This is an area that may call for learning from the trade jurisprudence. The WTO, from the cases seen and despite the regime's own manifest problems, showed a more advanced and settled jurisprudence with its dispute settlement and appeal mechanisms. The trade regime employs Article 31(3)(c) in its interpretative processes, helping to sheath the sword of criticism and providing potential learning curves for the investment regime, a prelude to a future convergence. Convergence clearly has a multiplier effect because if the two regimes, trade and investment are to converge, that will definitely reduce the manifest inconsistencies, incoherence and contradictory findings.*

Keywords: International Economic Law, Doctrine of Legal Convergence.

1. INTRODUCTION

Today international law is at a crossroad. For over two decades now, the fragmentation of international law has taken center stage in the discussion of the general threat facing international law as a legal system.³ The proliferation and diversity in the number of courts and tribunals, each interpreting and applying international law based on its own rules, ignoring or testing the jurisprudence of any other court or tribunal, are said to have triggered the fear that international law was fragmenting.⁴

The fragmentation of international law simply point to the increasing specialisation in the different fields of international law and the possibility of conflict occurring between the different specialties.⁵ Agreed, potential conflict(s) between different legal norms or principles may be unavoidable since the principles applicable in one may not necessarily be applicable in the other. Looking at international law, legal norms are said to interact in two different ways. First, in a 'complimentary' way when the norms accumulate and is possible to apply them together and the second, in a 'conflicting' way when the two norms are in breach of each other.⁶

International Economic Law, especially looking at the regimes of trade and investment for example, is not bereft of the fragmentation occurring in international law. The separation of trade and investment has both historical and economic undertones, which eventually led to the development of bifurcation in the legal regimes that regulate them.⁷ So international law manages trade and investment independent of each other. Take for example the foreign investment regime today with over 3,324 treaties agreed upon between States, out of which 2,958 are Bilateral Investment Treaties (BITs) and 367 are other treaties with investment provisions.⁸ Developed, capital exporting states conclude International Investment Agreements (IIAs) mainly for the protection of foreign investment.⁹

International trade, on the other hand, is regulated multilaterally through the World Trade Organisation (WTO) covering wide ranging issues from trade in goods, trade in services, trade-related investment measures and trade-related intellectual property rights and over 320 preferential agreements with some having investment chapters in them.¹⁰ The WTO's 164 members¹¹ assume responsibility/commitments to each other for the development of international trade rules and the free flow of trade.¹² Even though the WTO did not address foreign investment directly in any details in any of its provisions, some of these provisions are related to investment.¹³ Trade regulation is macro, interested in access to market and trading opportunities while the investment regime is micro, concern with investment drive and protection of investments made by individuals and companies. However, it is important to note that governments, in policy formulation, taking into cognizance the fact that those operating in the business environment do not put trade and investment into different compartments, usually plan economic policies and development measures with both schemes in mind.¹⁴ For example, one of the effects of the fragmentation of international law is clearly seen within international investment law in the contradicting arbitral awards' definition and interpretation of the non-discrimination principle applicable to NT, FET and MFN. The effects of Fragmentation are also visible in the investment-related trade rules embodied in the WTO System as it relates to the non-discrimination principle embedded in NT and MFN. The fragmentation occurring in these fields is, regrettably, without any systematic coordination. It is the effect of this and the need for the harmonisation of the interpretation of these international economic law regimes that informed this article. The article introduces the doctrine of legal convergence as a possible cure to the bifurcation/fragmentation of legal regimes.

2. THE DOCTRINE OF LEGAL CONVERGENCE

Though not exhaustively explored and developed academically, the doctrine of legal convergence has however achieved some level of appreciation and application in the combined jurisprudences of the ICJ, the ECJ, the WTO and NAFTA and even in other lesser-developed regional economic law instruments. The application of the principle in the mentioned bodies and organisations could provide a basis for the exploration of the idea of the ultimate harmonisation/convergence of the regimes of international economic law – trade and investment.

As a theory, 'convergence implies the increasing adoption by all governance systems throughout the world of a common set of institutions and practices, portrayed as an ideal rational/legal system...'¹⁵ In its simple, legal connotation, or as a legal doctrine, convergence is generally viewed as the coming together of two contending legal systems.¹⁶ Viewed in this context, the doctrine can serve as a veritable tool for a constructive harmonisation of legal principles, the reconciliation of inconsistency in interpretation, provision of greater clarity and certainty in the law and the shaping of future legal policy in both trade and investment

regimes. In order to achieve all the above, the article will first trace the origin of the doctrine of legal convergence. Secondly, it will examine the evidence of the existence of the doctrine, and thirdly it will analyse the application of the doctrine by various judicial bodies and organisations. The fundamental reasoning reached in the article is the proposition that legal convergence is an effective mechanism that can be used in bringing together the two contending legal regimes of trade and investment, for example by harmonizing the interpretation given to the common denominator of the two contending regimes, the principle of non-discrimination.

The idea here is not one for the full convergence or seamless fusion of the two regimes as one. This may prove to be a futile exercise for several reasons. First, for example, in the last two decades, a considerable number of WTO members (prominently among developing states), have shown their aversion to the inclusion of foreign investment as an all-inclusive negotiating item at both the 1996 Singapore and 2003 Cancun ministerial meetings.¹⁷ This position is a pointer to the fact that building convergence entirely on complete borrowing from the WTO will necessarily fail, no matter how tempting that jurisprudence looks.

Secondly, states do not seem to have the political appetite for a bold treaty reform needed to ensconce hard, systemic unification of the regimes of trade and investment.¹⁸ Even the Uruguay round that led to the formation of the WTO experienced some ideological horse-trading concerning the role of the States and of the markets.¹⁹ Furthermore, despite the strong bond between them, even the members of the Organisation for Economic Co-operation and Development (OECD) could not agree on a Multilateral Agreement on Investment.²⁰

3. AN OVERVIEW OF THE DOCTRINE

As an answer to the increasing fragmentation of international law, the idea of convergence seems to be gaining ground. Tracing the origin of convergence has not been easy as different theses point to varying origins of the doctrine.

Academically, one favoured view has been that the idea of legal convergence originated from Cicero's terse call for "no different laws in Athens and in Rome"²¹. Other arguments have been that the idea is traceable to Socrates but Antonios Platas maintained that the philosophical origin of the idea of legal convergence indeed goes back to both Socrates and Plato, and especially to Plato's theory for the postulation of universals.²² Plato's theory for the postulation of universals argued that it is in the nature of man to present and further accept the plural as singular, and this fundamentally mean that in substance, all leads to one as opposed to many.²³ Thus, by a way of correlation to law, Plato's theory of seeing the one as opposed to the many as something inherently built in human thinking and behavior can be used, by way of analogy, to lend credence to the argument against the continuance of divergent legal regimes or even divergent legal systems.

It is contended that though fragmentation has been accepted and prominently discussed as a major threat to international law, the idea of convergence has not been so explored and advanced.²⁴ However, as fragmentation continue to pose a serious threat to the unity and coherence of international law, convergence is equally receiving continuous attention within international legal scholarship more than the opposing claims to independence and uniqueness of varying legal regimes.²⁵

Even though the idea of legal convergence has not been actively canvassed through rigorous scholarship, nevertheless, it is gaining currency in the current reassertion of the role

of the International Court of Justice and in State practice²⁶, the workings and practices of the European Union, the International Monetary Fund (IMF), the North American Free Trade Agreement (NAFTA) and, most importantly, the World Trade Organisation (WTO) and many other, though lesser, regional economic law arrangements. It is then argued that the effectiveness of international law to assert itself as a generalist discipline lays in how it is able to manage divergent legal regimes by ensuring that these regimes take account of each other and address any existing conflict. Convergence and or harmonisation of relevant, similar regimes seem the way to go at present.

The idea of legal convergence seems more relevant now than ever before due to the increasing, widespread and unique developments in the internationalisation and transnationalisation of law.²⁷ A Treaty concluded by two States can be the subject of interpretation by an international arbitral panel and the WTO Panel or Appellate Body can hear a trade dispute, the decision rendered can resonate beyond the borders of the disputants and have effect on similar disputes before other tribunals or panels.

It is maintained that even within the same legal regime, any expression of conflicting legal views usually lead to the refinement and restatement of the correct position of the law based on sounder and more refined principle, whilst dispensing with confusing, irrational and less coherent ones.²⁸ The idea of legal convergence is one whose movement is not plainly referenced from the understanding of the jurists any more than it is indebted to the external construct of international law but rather that of logic.²⁹

The idea of common sense logic is as convincing in its currency as that of law. Practically, the logic behind legal doctrines is to encourage the determination of overlapping of legal regimes thereby giving endorsement for the refinement and convergence of these regimes. This clearly shows that logic stands as an authoritative beginning that guide the planning of law and legal convergence. This idea clearly supports the argument for the regimes of international trade and international investment law to go back to their root and converge.

It has been argued that the predominant authority behind the push for legal convergence has been the quest for existence and interdependent economic costs and benefits.³⁰ These economic thoughts are the guiding light behind the unification of the laws of international trade and international investment law. As such, this support the theory that there are identical benefits that flow from harmonisation of divergent international economic laws so as to facilitate trade and investment.

International law has been at the forefront in the quest for legal convergence. Varying fields of public international law are experiencing tensions and conflicts as they strive to establish a balance of the competing stakeholder interests in these fields. The relevant positions of the State, foreign traders and foreign investors readily come to mind and this has strengthened the desirability for common or uniform interpretation of major international instruments. Thus international law set out to be the fundamental driver of the idea of legal convergence by the dissipation of common standards and the resultant application of uniform interpretation of applicable laws.

At the world stage, and before various dispute settlement bodies, both international trade law and international investment law on the one hand and public international law seem to overlap. Each of these fields also has played important role in very many other areas of law. For example in the field of international trade, the regime has profound impact in such areas like intellectual property law, taxation, derivatives, investment law, competition law

and anti-trust law. The same apply to international investment law. It is emphasized that all these legal areas overlap and interact on the world stage. As such, it is the idea of legal convergence that all these fields need to fuse together based on their relevance to one another, this is with a view to having uniform laws that will promote free trade, protect investment and integrate both regimes for increased productivity.

4. WHY LEGAL CONVERGENCE? THE FRAGMENTATION AND DIVERGENCE OF INTERNATIONAL LAW

A clear, in-depth and focused application of the concept of legal convergence cannot be fully appreciated without going back to what necessitated the development of the concept. It is arguable that the continuous fragmentation of international law through the emergence of autonomous and specialized regimes has continued to pose a threat to international law itself as a legal system.

Over half a century ago, Wilfred Jenks provided the context within which fragmentation developed.³¹ The first phenomenon was the evident lack of established legislative body in the world that Jenks explained thus:

“...law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.”³²

Jenks argument remains true today just like it was fifty years ago. The second phenomenon, linked directly to the law, was stated thus:

“One of the most serious sources of conflict between law-making treaties is the important development of the law governing the revision of multilateral instruments and defining the legal effects of revision.”³³

The above can be attested to not only by the number of multilateral treaties concluded by States but also by the many other formal regulatory regimes. Public international law is so fragmented by the emergence of specialized, autonomous regimes in wide-ranging fields like “human rights law”, “environmental law”, “trade law” and even “investment law”, each with its own general body of rules, institutions and some even with their own internal dispute settlement mechanisms. Most of these specialized and relatively autonomous rules or regimes work in isolation of other contiguous regimes and institutions within the larger body of the principles and practices of international law.³⁴ The resultant effects of these are the gradual erosion of the principles of general international law, inconsistency in interpretation, conflicts between rules, conflicting jurisprudence, forum shopping, incoherence, divergent institutional practices and eroding legal security.

Agreed, other publicists see the issue as merely a technical one, which is a result of the increasing legal activity across disciplines, and are convinced the problem can be resolved simply by cooperation.³⁵ Practically, this assumption is over simplifying the issue and will not address the problem. As the International Law Commission reasoned in its critique of fragmentation, the development of ‘self-contained regimes’ is posing serious problems to the coherence in international law.³⁶ It seems to be the case that these specialized, self-contained regimes did not come into existence by accident rather as an answer to emerging technical and functional requirements.³⁷ An example of this will show that “Trade law”, for example, evolves as a mechanism to manage international economic relations.³⁸ And as such, it becomes imperative to resort to the application of certain developed techniques in the

resolution of tension and conflicts in these regimes – in this case, trade and investment regimes.

The end of the Second World War saw States agreeing to the General Agreement on Tariffs and Trade (GATT1947) in order to liberalize barriers to foreign trade and also to treaty protections for foreign investments. Despite their coming into existence around the same time and their shared attributes, these two regimes of international economic law have developed distinctly, with their differences sometimes seen to outweigh their similarities.³⁹ For example, while the WTO uses the default State-to-State dispute settlement system, the investment regime augments that by allowing foreign investors of a signatory home State the legal standing to challenge a breach of relevant aspects of the treaty in question. On the other hand also, there seems to be a fundamental sociological divide among actors and or practitioners spread throughout both fields. While the Appellate Body's objective application of the WTO treaty members' agreement helped in no small measure in the coherence and integrity of the trade law jurisprudence, its equivalent, that could have avouched for a correct interpretation of investment treaties, is almost completely absent in the investor-state arbitration system.⁴⁰

As is central to this argument, the divergence between these two contending systems has led to deeply fractured and disturbing pathologies, with poor interpretative methods in investment arbitration, which in turn has led to the inconsistencies in arbitral awards. Further to these disturbing pathologies, Jurgen Kurtz moved the narrative by canvassing a new opinion that this problem of inconsistency in methodology and results stand different from that of incoherence.⁴¹

Jurgen Kurtz, in postulating what he called 'five convergence factors', argued that the two regimes could not continue in the present divergent ways despite the gaping disconnection in their treaty texts, jurisprudence, methodologies and stakeholder perception.⁴² These convergence factors⁴³ are worth reproducing and explained here to show how the argument for harmonisation of the two regimes is gaining steam, and most importantly to set the phase and show how this article will canvass and forge a different pathway from Jürgen's position.

First, the two systems evidently share common legal terrain. Trade and investment share common legal terrain despite the seeming airtight separation of the two systems. Foreign investment in the services sector is regulated extensively within the WTO against the vital role of that sector as a proportion of global foreign direct investment (FDI) flows. The two regimes incorporate a number of shared micro norms notably their restrictions against State discrimination in the form of both national and most-favoured-nation treatment. Both trade and investment regimes inherently assure competitive opportunity between foreign and domestic goods, services and investors. A more interesting dimension this first convergence factor is taking is the way States are becoming more engaged in managing likely conflicts between investment treaty norms and WTO law. In fact, they have moved further to review their commitments by inserting flexibilities for state regulation in relation to foreign investors and their investments, and, interestingly, they do this by drawing on the WTO model to guide their reform efforts. In many modern FTA's, full WTO exceptions are simply incorporated into investment chapters by reference.⁴⁴

Second is the jurisdictional connection between the two regimes. There are times a measure can fall within the jurisdictional competence of both regimes and even adjudicated concurrently. This jurisdictional interrelationship is evident in the *Softwood Lumber* dispute

between the United States and Canada, which triggered both WTO and NAFTA claims.⁴⁵ The complicated ‘soft drinks’ dispute between Mexico and the United States had triggered national treatment claims both by the US as a State party in the WTO⁴⁶ and by a scope of US investors under NAFTA Chapter 11⁴⁷. It should be noted that the fact that these proceedings have been completed does not stop the possibility of overlapping litigation or parallel proceedings.

Third, the likelihood of the above parallel proceedings is simply informed by both economic logic and reality with clear example in the inter-dependence of cross-border trade and foreign investment.

The fourth is the cross-fertilization of the jurisprudence of the two regimes especially their dispute settlement systems. For over two decades now, the two regimes have advanced dispute settlement systems with adjudicators now drawing on jurisprudence from one system when constructing readings on treaty obligations in the other. For example, it is evident the problematic transplant on the use of WTO law in investment arbitration – with arbitrators borrowing substantially from WTO jurisprudence especially when defining readings on national treatment in investment law.⁴⁸ Though the growing phenomenon of cross-fertilization of method and substance flow largely from the more established WTO law to investor-state arbitration, the WTO Appellate Board has also cited an investor-state arbitral award.⁴⁹

The fifth convergence factor explored by Jurgen Kurtz is the movement of actors across the two fields. The more settled jurisprudence of the WTO law is presently being diffused to elements of investment treaty law by the deliberate choice of specific and identifiable judges. A good example is the Continental Award where the award draws extensively from the WTO law, not only that, the fact that even the president of the tribunal was a WTO Appellate Board member.⁵⁰ The combined effect of these two factors in the Continental Award is sure to be reflected in many future arbitral awards.

Even though the argument for convergence advocated by Jürgen’s work rhyme with this article, his solution for the future engagement between the fields of international trade and international investment law was to create research models that he termed the double helix metaphor. This article takes a different position because his model fell short of engaging the most fundamental convergent point in international economic law as the basis of analysis, which is the principle of non-discrimination. Though he agreed with the shared history between the two field, he neglected, and in certain areas even completely refused the economic rationale that binds them together, hence falling short of seeing reason in the idea of firm convergence or harmonisation of the principles in the two regimes. This article maintains that the principle of non-discrimination on its own can serve as a convergent point because economic law is centrally about non-discrimination. The principle of non-discrimination maintains its superiority over any other standard and the principle’s permeability throughout all other standards has never been in contention.

5. FUNCTIONS AND APPLICATION OF LEGAL CONVERGENCE BY INTERNATIONAL JUDICIAL BODIES AND ORGANISATIONS

In different texts, legal convergence and harmonisation have often been used interchangeably. The increased fragmentation of international law evident in the diversity of legal regimes and specialist fields solidify the argument for coherence and integration of relevant regimes.⁵¹ Convergence functions primarily to deal with fragmentation of international law generally, and its future seems positive in view of the reassertion of the

doctrine by the international court of justice.⁵² The reassertion of the doctrine has gone a long way in ensuring that not only the methodology but also the principles of international law are changing with tacit support of the ICJ, treaty bodies and other relevant tribunals.⁵³

Further to the reassertion of the doctrine by the ICJ, convergence is also gaining momentum in the way State practice is changing with governments' increasing support using both national and international medium. The jurisprudence of the highest domestic courts are becoming more adaptive of and giving effect to international law.⁵⁴

6. THE INTERNATIONAL COURT OF JUSTICE (ICJ)

According to Judge Christopher Greenwood, it was the proliferation of various courts and tribunals that animated the fear of the fragmentation of international law.⁵⁵ The ICJ has been supplemented by many other tribunals like the ITLOS, ad hoc criminal tribunals or courts for Rwanda, the former Yugoslavia, Sierra Leone, Cambodia, Lebanon, the DSU of the WTO and other regional human rights tribunals, all busy with settling various cases or arbitrations between States or between States and investors. The above courts and tribunals, established under no any judicial or quasi-judicial hierarchy, have the chance of interpreting and applying the rules of international law in their decisions in contradiction to the rules and jurisprudence of many other courts and tribunals, making fragmentation of international law a more serious concern.⁵⁶

The progressive move towards convergence through the cross-fertilisation of jurisprudence has made the above fears to wither away based on the consistency and coherence in the approach of the ICJ and other arbitral tribunals in their judgments and awards and the extensive reference of these judicial and quasi-judicial bodies to the jurisprudence of many other relevant courts and tribunals.⁵⁷ In *Bay of Bengal*⁵⁸ case, the International Tribunal on the Law of the Sea, ITLOS, based its 2012 judgment on the compelling jurisprudence of the International Court of Justice by drawing heavily from it. A more convincing argument for convergence related to the Bay of Bengal case was when the International Court of Justice, while deciding the case of *Nicaragua v. Columbia*⁵⁹ in turn also relied on the reasoning of the tribunal in Bay of Bengal thereby enhancing the development of a coherent body of law and practice.⁶⁰

In the recent and well known *Diallo*⁶¹ case, the International Court of Justice was, among others, to determine the amount of compensation to be given to the Republic of Guinea by the Democratic Republic of the Congo over the latter's treatment of a Guinean national. The court, in a judgment that points to the increasing convergence of international law, drew both from the jurisprudence and experience of the Iran-U.S Claims Tribunal and other human rights tribunals.⁶²

What is seen in the above examples did not only represent convergence or harmonisation of contending legal regimes per se but more of the assertion of the drive towards the unity of international law from within. More of this will be seen in the following discussion of other courts and tribunals. Most definitely the convergence thesis this research is mainly focused on is that between the trade and investment disciplines in the quest for coherence in the determination and interpretation of the treaties underlying these regimes. Coherence, certainty and consistency from within are necessary corollaries to convergence between contending regimes generally and among relevant standards applicable to the regimes.

7. THE WORLD TRADE ORGANISATION (WTO)

Among all international economic law regimes, the WTO seems to be the most advanced in the promotion of legal convergence of regimes especially in the areas of subsidies and countervailing measures by offering liberal economic principles to which all the WTO Members must adhere.⁶³ From the construction of the WTO Agreement, it is evident that all the rules of the organisation are applicable to all the Members with no room for reservation.⁶⁴ This is also another form of convergence from within.

For example, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement provided the platform for legal convergence among all WTO members in three different ways: first, for a WTO country to fulfill its undertaken obligations under the TRIPS, all its national legislation has to be brought into effect; secondly each WTO member is required to provide the same level of protection to nationals of other WTO member countries as it would provide its own nationals in relation to intellectual property rights and thirdly, a WTO member is to provide the most-favoured-nation treatment to all other WTO members in relation to the same matter.⁶⁵

The TRIPS Agreement was reached under the WTO as a boundary between the international trade law and the coverage of intellectual property rights.⁶⁶ The TRIPS Agreement is so extensive covering such aspects of intellectual property law such as copyright⁶⁷, trademarks⁶⁸, geographical indications⁶⁹, industrial designs⁷⁰, patents⁷¹, undisclosed information matters⁷² and anti-competitive licences in contractual licences.⁷³ The TRIPS Agreement under the WTO framework, for it to operate in any domestic laws, necessarily require extensive legal amendments, thereby changing the nature of international economic law.⁷⁴ The WTO also contain a highly developed system for the implementation of the TRIPS Agreement.⁷⁵

The WTO is seen as a compelling example of how legal economic systems promote legal internationalism and convergence of different and differing legal systems.⁷⁶ Its multilateral nature, the investment chapter therein, extensive jurisprudence and sophisticated dispute settlement mechanism that has its in-built appeal system have made the WTO to serve as a beacon of hope for the convergence of otherwise divergent legal regimes. The International Monetary Fund is another important sector of international economic law that promotes internationalism and convergence on quite a large scale.

As will be explained in the next sub-topic, the development of regional economic blocks has had a profound impact on the legal convergence progressively seen in the entire trade law sphere.

8. THE EUROPEAN COMMUNITY/EUROPEAN UNION

The European Union is an international organisation whose principal business is the bringing together of some legal areas of the Union – convergence of legal systems. As an international economic organisation, the EU is “rooted in the rule of law under the auspices of the European Court of Justice”.⁷⁷ It is evident that all the member States of the Union must have satisfied all the relevant requirements before accession and the most important was aligning their domestic laws and regulations in all respective areas, with that of the Union.⁷⁸ It is noted, however, that any member State can negotiate an opt-out following laid down procedure, a good example can be seen in how the United Kingdom and the Republic of Denmark negotiated an opt-out from the single currency of the Union.

The EU originally started as an economic law experiment before transforming into a successful political economic union, which shows convergent economic law has triumphed.⁷⁹ The economic integration of the countries that today make the European Union effectively commenced with the 1989 liberation of capital flow throughout all member States.⁸⁰ The monetary union achieved in 1992 finally paved the way for the single currency that materialized in 1999.

It would have sufficed to exemplify the unity and convergence of international law or specifically international economic law within the EU by reference to the EC Directives, especially EC Directive 93/13/EEC and EC Directive 99/44/EC. However, it seems there is a more compelling argument for convergence of international economic law within the EU than what the EC Directives covered⁸¹. Furthermore, the ongoing negotiation between the EU and the US on the Trans-Atlantic Trade and Investment Partnership TTIP, though still in its fluid form, is a firm testament to the convergence-taking place not only within the EU but also in international economic law generally.⁸²

Many other regional economic arrangements are encouraging convergence of economic laws just like the European Union has done, though to a lesser extent than the older, more developed harmonisation coming from the EU. Good examples can be seen in the North American Free Trade Agreement (NAFTA), the Economic Community of West African States (ECOWAS), the Association of South East Asian States (ASEAN), the African Union (AU) and the Commonwealth of Independent States. The success of the EU's convergence of its economic law regimes and its overall integration led these other regional blocks to aspire to converge their economic laws.⁸³

Having seen the development and application of the doctrine of legal convergence in varying fields of international law and its efficacy in the convergence of two systems both within and without, a summary of some of the justifications that necessitate the need for convergence will be apt here, the details of some of which have been discussed above. These justifications include the interpretive discrepancies existing in the two fields, the sometimes-shallow legal reasoning in Arbitral Awards, the shared history/commonality of their legal terrain, the jurisdictional overlap between the two fields and the movement of actors from one regime to the other. The question now is how can legal convergence be achieved in the regimes of trade and investment law analysed above? The VCLT seems to be a suitable tool to be applied here.

The Vienna Convention popularly referred to, as the Canon of treaty interpretation, can be used to make the case that the Convention has enough in its provisions that will allow for its application in the convergence of the two legal regimes.

In any treaty, it is the object and purpose of the treaty and the context in which the treaty's provisions appear, and the other rules that are most relevant in the interpretation of the treaty.⁸⁴ For example they are fundamental in the reconciliation of investment/trade protection using the relative protection standards in both.⁸⁵ A look at treaty's object necessarily entails taking the treaty as a whole, from its preamble to the entire substantive provisions. So both the preamble and substantive provisions are important in treaty interpretation. Failure to do that may lead to a narrowing of the treaty's object and purpose, which is not what Article 31(3)(c) VCLT envisaged.⁸⁶ The reference to 'other rules' under the provisions of the article is clearly beyond those rules applicable to the subject matter of the treaty under consideration but is extended to include all those rules that are relevant and that will assist in the understanding of the relative terms of the treaty.⁸⁷ So for example in a

BIT, the arbitral tribunal, further to the provisions of Article 31(3)(c), may make reference to the provisions of another treaty binding between the parties before it or to the rules of customary international law in its findings.⁸⁸

9. CONCLUSION

From the above discussion, it is evident that interpretation of treaties, taking for example the interpretation of the principle of non-discrimination in trade and investment treaties has been at best inconsistent, especially in investment treaty arbitration. This is an area that may call for learning from the trade jurisprudence. The WTO, from the cases seen and despite the regime's own manifest problems, showed a more advanced and settled jurisprudence with its dispute settlement and appeal mechanisms. The trade regime employs Article 31(3)(c) in its interpretative processes, helping to sheath the sword of criticism and providing potential learning curves for the investment regime, a prelude to a future convergence. Convergence clearly has a multiplier effect because if the two regimes, trade and investment are to converge, that will definitely reduce the manifest inconsistencies, incoherence and contradictory findings.

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¹⁶ See generally, Antonios E. Platsas, 'The Idea of Legal Convergence and International Economic Law'. See also Platsas (Ph.D Thesis on the Idea of Legal Convergence, 1997, University of Ireland).

¹⁷ Jurgen Kurtz, 'Developing Countries and Their Engagement in the World Trade Organisation: An Assessment of the Cancun Ministerial' *Melbourne Journal of International Law*, 5(1), 2007, 248-263.

¹⁸ Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems*, International Trade and Economic Law Series, (CUP 2016) 23.

¹⁹ P. Yu, 'TRIPS and Its Discontents' *Marquette Intellectual Law Review* 369, (2006) 10.

²⁰ Peter Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?', *The International Lawyer* 1033, (2000) 34.

²¹ Cicero, *De Republica*, III, xxii, 33, as quoted by Antonios E. Platas (n.14).

²² Antonios E. Platas (n.14), see also Plato's *Rep.* 596a wherein he stated: 'We are in the habit of posting a single form for each plurality of things to which we give the same name'.

²³ Plato.

²⁴ Mads Andenas and Eirik Bjorge, (n.2) 1.

²⁵ Mads Andenas and Eirik Bjorge, (n.2) 2.

²⁶ Mads Andenas and Eirik Bjorge, (n.2) 2.

²⁷ Ole Spiermann, 'Twentieth Century Internationalism in Law', 18 *Eur. J. Int'l L.*, (2007) 785, 788.

²⁸ Alexander W. Street SC, 'The Art of Legal Convergence', UNSW Litigation Master Class 26 March 2013, 4.

²⁹ Alexander W. Street SC.

³⁰ Alexander W. Street SC.

³¹ Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 2006, 10.

³² C. Wilfred. Jenks, *The Conflict of Law-Making Treaties*, BYBIL Vol.30, (1953) 403 as quoted by Koskenniemi, (n.29) 10.

³³ C. Wilfred. Jenks.

³⁴ Martti Koskenniemi, (n.29) 11.

³⁵ "'Symposium: The Proliferation of International Tribunals: Piercing the Puzzle'", *New York Journal of International Law and Politics*, Vol. 31 (1999) 679-993.

³⁶ As explained by Koskenniemi, see Martti Koskenniemi, (n.29) 14.

³⁷ Martti Koskenniemi, (n.29) 14.

³⁸ Martti Koskenniemi, (n.29) 14.

³⁹ Jurgen Kurtz, (n.16) 1.

⁴⁰ Jurgen Kurtz, (n.16) 5.

⁴¹ Jurgen Kurtz (n.16) 6.

⁴² Jurgen Kurtz (n.16) 11.

⁴³ Jurgen Kurtz (n.16) 10 – 20 for an exhaustive analysis of these factors.

⁴⁴ Jurgen Kurtz (n.16) 12, see also *Australia-ASEAN-New Zealand Free Trade Agreement*, 27 February 2009, Ch.15, Art.1 (2).

⁴⁵ *Softwood Lumber Case* (United States v. Canada).

⁴⁶ *Mexico-Tax Measures on Soft Drinks and Beverages*, Report of the Appellate Body (WT/DS308/AB/R, 6 March 2006); *Mexico-Tax Measures on Soft Drinks and other Beverages*, Report of the Panel (WT/DS308/R, 7 October 2005).

⁴⁷ *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, Award (ICSID, 12 November 2007); *Corn Products International, Inc. v. Mexico*, Decision on Responsibility (ICSID, 15 January 2008); *Cargill, Inc. v. United Mexican States*, Award (ICSID Case No. ARB (AF)/05/2, 18 September 2009).

⁴⁸ *Occidental Exploration & Production Co. v. Ecuador*, Final Award (UNCITRAL, 1 July 2004), paras 174-176, *Methanex Corp. v. US*, Final Award, Pt. IV, Ch.B, paras 28-30.

⁴⁹ For example *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Report of the Appellate Body (WT/DS344/AB/R, 30 April 2008), para. 160, n.313.

⁵⁰ *Continental Casualty Co. v. Argentine Republic*, Award (ICSID Case No. ARB/03/9, 5 September 2008).

⁵¹ Mads Andenas and Eirik Bjorge, (n.2) 12.

⁵² The position of the ICJ as the principal judicial organ of the United Nations will further give lots of credibility to the doctrine.

⁵³ Mads Andenas and Eirik Bjorge (n.2) 2

⁵⁴ Mads Andenas and Eirik Bjorge (n.2) 2.

⁵⁵ Christopher Greenwood, 'Unity and Diversity in International Law', in Mads Andenas and Eirik Bjorge (n.2) 46.

⁵⁶ Christopher Greenwood.

⁵⁷ Christopher Greenwood (n.53) 47.

⁵⁸ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, ICJ, Judgment of 14 March 2012.

⁵⁹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, I.C.J Reports 2012.

⁶⁰ Christopher Greenwood (n.53) 47.

⁶¹ *Ahmadu Sadio Diallo (Guinea v. the Democratic Republic of Congo)*, Compensation Judgment, I.C.J Reports 2012, 324.

⁶² Though a relatively short judgment, however, it did invoked the practice of the European Court of Human Rights, the UN Human Rights Committee, ITLOS, the African Commission on Human and People's Rights, the UN Compensation Commission, the Inter-American Court of Human Rights, the Eritrea-Ethiopia Claims Commission, the Iran-US Claims Tribunal and the award in the *Lusitania* claims.

⁶³ Antonios E. Platsas (n.14) 7.

⁶⁴ Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* (3rd edn. 2005) 642.

⁶⁵ Asif H. Qureshi & Andreas R. Ziegler, *International Economic Law* (2d edn.2007), 339-340

⁶⁶ Asif H. Qureshi & Andreas R. Zeigler, 338-339.

⁶⁷ Arts. 9-14 TRIPS

⁶⁸ Arts. 15-21 TRIPS

⁶⁹ Arts. 22-24 TRIPS

⁷⁰ Arts. 25-26 TRIPS

⁷¹ Arts. 27-38 TRIPS

⁷² Art. 39 TRIPS

⁷³ Art. 40 TRIPS

⁷⁴ Antonios E. Platsas (n.14) 7.

⁷⁵ Asif H. Qureshi & Andreas R. Zeigler (n.63) 339.

⁷⁶ Antonios E. Platsas (n.14) 8.

⁷⁷ Ole Spiermann, (n.25) 785, 787.

⁷⁸ Presently, the EU comprises of 28 Member States (As this moment the U.K is discussing its exit as a fallout of the Brexit) and each of these must have satisfied all the legal requirements covered in thirty-five legal chapters before accession. For all the chapters, see http://ec.europa.eu/enlargement/enlargement_process/accesion_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm#3.

⁷⁹ Antonios E. Platsas (n.14) 4.

⁸⁰ See Tony Cleaver, *Understanding the World Economy* (3d ed. 2007) 111.

⁸¹ It is noted that the EC Directives have been the subject of attack by some academics as, contrary to our perspective, producing divergence rather than convergence, for example, EC Directive 93/13/EEC.

⁸² The TTIP/TTP represent examples of convergence developing in the area, though they are also seen as reactionary regimes developed by these countries currently facing a lot of debate due to varying factors facing these seeming partners.

⁸³ Tony Cleaver, (n.78) 121.

⁸⁴ See generally Richard Gardiner, *Treaty Interpretation*, (Oxford University Press, 2008) 190.

⁸⁵ However, it is noted that the argument of employing the purpose of a treaty in its interpretation has not been without criticism.

⁸⁶ See for example the concept of narrowing in *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010).

⁸⁷ This does not in anyway preclude the reference of rules to the States as the main parties to the treaty under consideration.

⁸⁸ Though the customary international rules application to interpretation in multilateral treaty using Article 31(3)(c) VCLT is not as easy to apply under the BITs, nonetheless, the reference can still be from one regime to the other.