Invoking Systemic Ideals or Systemic Rules? Jurisdiction in WTO and Investor-State Dispute Settlement

Nicola Claire Strain*
PluriCourts, University of Oslo, Oslo, Norway
n.c.strain@jus.uio.no

Abstract 401
Keywords 402
I. Introduction 402
II. Adjudicative Functions and Systemic Integration: Comparison of WTO and Investor-State Dispute Settlement 406
III. Systemic Integration in the Reasoning of WTO and Investor-State Dispute Settlement Mechanisms 408
1. Appeals to a System of International Law: Empirical Observations 409
2. Methodological Pluralism and the Problem of Systemic Integration 413
IV. Systemic Integration and Jurisdiction: a Complicated Relationship? 419
1. Relationship Between Jurisdiction and Systemic Integration: ISDS 419
2. Relationship Between Jurisdiction and Systemic Integration: WTO Disputes 422
V. Conclusion 423

Abstract

How do international economic adjudicators approach the question of systemic integration? Systemic integration could be a powerful tool in the defragmentation of the international legal order. Yet, it is a complex tool, coalescing between a legal rule of interpretation and normative ideal of a coherent international legal order. By undertaking an empirical and doctrinal review of the decisions of the World Trade Organization (WTO) and investor-state dispute settlement mechanisms, the paper illustrates both the under-utilisation and inconsistent application of the principle within the reasoning of those adjudicators. The paper analyses how international economic law adjudicators attempt (or perhaps fail) to define the indeterminate legal author-

* Research Fellow, PluriCourts, Universitetet i Oslo. This work was partly supported by the Research Council of Norway through its Centres of Excellence funding scheme (project number 223274 – PluriCourts: The Legitimacy of the International Judiciary) and the Funding Scheme for Independent Projects (FRIPRO) (Young Research Talents) (Project Number 274946 – State Consent to International Jurisdiction: Conferral, Modification and Termination, Professor Dr. Freya Baetens).

ity of systemic integration. What is contributing to this methodological pluralism in the application of systemic integration? The paper investigates both the competing 'law-applying' or 'law-making' adjudicative functions and the limitations of tribunal jurisdiction as possible explanations for the competing perceptions of the role of systemic integration in international economic dispute resolution. The underutilisation and inconsistency of systemic integration in the WTO and investor-state dispute settlement mechanisms highlights the need to bridge the gap, both theoretically and doctrinally, in understanding how systemic ideals fit within legal rules.

Keywords

WTO – Investor-State Dispute Settlement – Jurisdiction – Systemic Integration – Defragmentation – Judicial Functions

I. Introduction

In the face of unclear state-made legal rules on the judicial responses to (de)fragmentation,[1] are adjudicators drawing on an overarching view of the international judicial function to bring legitimacy and coherence to international law? This question is particularly pertinent at a time when dispute settlement mechanisms are facing significant backlash and criticisms of judicial activism, with some states pushing for a more formalist vision of the

1 'Fragmentation' refers to the process of expansion of international law and emergence of specialised regimes, leading to a negative view of the risks of the proliferation of international courts. See, for example, Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle', N. Y. U. J. Int'l L. & Pol. 31 (1998), 679-696 (680); Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press 2004), 10. 'Defragmentation' is its counterpart: a moral or normative preference for coherence and systemic order over plurality. See, Luca Pasquet, 'De-Fragmentation Techniques', *Max Planck Encyclopedia of International Procedural Law* (online edn, Oxford: Oxford University Press 2018), para. 68; Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms and Conflict of Laws? Different Techniques in the Fragmentation of International Law' in: Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing 2011), 19-44 (20). As such, defragmentation is a combination of complex and interrelated concepts that may push and pull the tribunals in different directions, exemplified in the International Law Commission's (ILC) Fragmentation Report: Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (International Law Commission 2006) A/CN.4/L.682.

mechanisms.[2] Can an international adjudicator adopting a lawmaking function strike an appropriate balance between, on the one hand, the limitations of consent to jurisdiction and, on the other, responding to the challenges of a complex and fragmented international legal system? To answer these questions, the paper focuses on systemic integration and its relationship to jurisdictional limits of international tribunals. Systemic integration is a complex tool, coalescing between a legal rule and a normative ideal: from an interpretative tool in identifying the parties' intentions to a broader function in enhancing the coherence of the international legal system.[3] As the normative ideal embodied in the function of systemic integration is vague, different approaches to the relationship between such an ideal and jurisdictional legal rules have emerged.

This paper investigates the methodological pluralism of investor-state tribunals and the panels and Appellate Body of the WTO[4] in the process of systemic integration, analysing how adjudicators attempt (or perhaps fail) to define the indeterminate legal authority of systemic integration. WTO and investor-state dispute settlement mechanisms are ideal candidates for comparative research on the defragmentation and coherence of international law. On the one hand, there is the compulsory and exclusive jurisdiction of the WTO dispute settlement mechanism, with a standing appellate mechanism (albeit currently defunct), that clarifies the existing provisions of a comprehensive set of multilateral agreements. Yet, the WTO Dispute Settlement Understanding (DSU)[5] adopts a mix of political and legal terminology and methods of dispute resolution. On the other hand, there is a diverse and heterogeneous network of international investment agreements (IIAs)[6] without a unifying dispute settlement mecha-

2 See, for example, Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', International Journal of Law in Context 14 (2018), 197-220; Joost Pauwelyn and Rebecca J. Hamilton, 'Exit from International Tribunals', Journal of International Dispute Settlement 9 (2018), 1-12; Johann Robert Basedow, 'Why De-Judicialize? Explaining State Preferences on Judicialization in World Trade Organization Dispute Settlement Body and Investor-to-State Dispute Settlement Reforms', Regulation & Governanc 2021, online.

3 Systemic integration is a principle of treaty interpretation, which is expressed in Article 31 (3)(c) of the Vienna Convention on the Law of Treaties and requires a tribunal 'to take into account the normative environment more widely': see Koskenniemi (n. 1), paras 414-416.

4 Throughout this paper, these adjudicatory bodies will be referred to as dispute settlement mechanisms since the WTO panels and the Appellate Body are not strictly a court or tribunal.

5 The Dispute Settlement Understanding being the constitutive treaty establishing the jurisdiction of WTO panels and the Appellate Body: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 (15 April 1994), 1869 UNTS 401.

6 IIAs broadly refers to bilateral investment treaties, multilateral investment treaties, treaties with investment provisions and free trade agreements that also include investment chapters.

nism, but rather an array of ad hoc arbitral tribunals that draw from some of the procedures of private international arbitration, in what is collectively termed investor-state dispute settlement (ISDS).[7]

The differences in dispute settlement mechanism design and the language of their constitutive treaties has led to a view of the WTO dispute settlement mechanism as more restrained in its incorporation of other international law than its investor-state counterparts. WTO panels are supposedly less amenable to other international law, rules, and principles as part of their applicable law or laws used in interpretation, thereby creating a more siloed dispute settlement mechanism. Such assumption is based on the compulsory jurisdiction of the WTO dispute settlement mechanism, the lack of an applicable law clause in the DSU and limited reference to applicable international law beyond the customary rules of interpretation.[8] The fact that these diverse regimes may exhibit similar inconsistencies and methodological pluralism is evidence of the need to re-conceptualise our approaches to jurisdiction and the defragmentation occurring through systemic integration.

This paper tests such assumptions of the divergent approach to international law in these two dispute settlement mechanisms and develops the picture of methodological consistency or methodological pluralism in three steps. First, in Section II, the functions of adjudication and different perceptions of systemic integration are addressed. Secondly, Section III illustrates the quantitative approach to systemic integration in WTO and ISDS disputes. The paper utilises a combination of empirical and doctrinal observations. The analysis was conducted across all WTO panel and Appellate Body reports, from the first report in 1995 until 31 December 2020, totalling 402 reports.[9]

---

7 See, Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press 2016); Szilárd Gáspár-Szilágyi, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge: Cambridge University Press 2020); Michelle Q. Zang, *Judicial Engagement of International Economic Courts and Tribunals* (Cheltenham: Edward Elgar Publishing 2020).

8 See, for example, Alvarez, who argues that ISDS arbitrators are 'far more likely to consider other international legal rules […] ISDS tribunals, while charged with enforcing investment law, are not limited to the application of investment treaty law – at least not in the way WTO adjudicators are limited to applying the GATT-covered agreements': José E. Alvarez, 'Epilogue: 'Convergence' Is a Many-Splendored Thing' in Szilárd Gáspár-Szilágyi, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge: Cambridge University Press 2020), 285-312 (311).

9 The WTO Documents Online database contains all publicly available information on the reports of the panels and Appellate Body. The database was searched for all reports of these two bodies up until 31 December 2020. This search resulted in 486 documents (excluding addendums). 84 of these documents have then been removed from further analysis as they represent corrigendum or mutually agreed solutions to the disputes. This leaves a total of 402 reports for doctrinal and empirical analysis.

For ISDS, the analysis is limited to publicly-available awards brought under IIAs.[10] Since the majority of investor-state disputes are based on IIAs,[11] the investor-state awards that potentially discuss application or interpretation of international law were identified through two data-collection steps: free-text and technology-assisted searches,[12] and year-sampling of all partial or final awards from a five-year dataset.[13] While some decisions may not have fallen within the free-text search methodology, the year-sampling suggests this will have limited to no impact on the final results of the analysis.[14] In total, 499 investor-state awards based on IIAs were analysed from 1990 until 31 December 2020[15] and included in Section III's empirical analysis. Finally, Section IV of the paper considers how state consent and jurisdiction interact with the concept of systemic integration, providing an in-depth analysis of the approaches of adjudicators in WTO and investor-state disputes to this question.

10 The confidentiality of ISDS awards is an issue for any large-scale empirical or doctrinal study of ISDS. However, this does not affect the results of this study as the number of confidential awards, particularly ICSID and IIA-based awards is quite low. Results from the PluriCourts Investment Treaty and Arbitration Database (PITAD) indicate that only 26.9 % of the known decided cases do not have a publicly available final award. Behn et al. also note that there are nearly 100 cases that are known to be completely confidential non-ICSID cases, for which we do not know whether a final award exists or if there was any other outcome in those cases: Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?', The Journal of World Investment & Trade 21 (2020), 188-250 (188, 192 and 195).

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

12 Free-text searches included 'systemic integration' (and Article 31(3)(c)), 'countermeasures' (and ILC Article 22), 'counterclaims', 'necessity' (and ILC Article 25), 'human rights' (and indigenous rights), 'WTO' (and GATT), 'ICJ' and 'general principles of law' with different Boolean operators to find all variations of the search term. These search terms were used across two databases: the Investor-State Law Guide <https://www.investorstatelawguide.com/User/Welcome> and JusMundi <https://jusmundi.com/en/coverage>. The subject-navigator and article citator tools on these databases were also reviewed for possibly relevant decisions.

13 The five-year data set was selected to represent the more recent approach to other international law in investor-state arbitration (2018 to 2020 decisions) combined with two earlier years to indicate any evolution in dispute settlement (1998 and 2008).

14 A total of 177 partial or final awards (and decisions on annulment), with jurisdiction based on an IIA, were collected in the year-sampling. Of the total decisions in the year-sampling, over two-thirds had already been gathered through the free-text searches and only a small fraction of those not collected through free-text searches raised relevant other international law issues.

15 As at 1 January 2020, there were 1,126 cases based on substantive bilateral investment and free trade agreements: Behn, Langford and Létourneau-Tremblay (n. 10), 191.

II. Adjudicative Functions and Systemic Integration: Comparison of WTO and Investor-State Dispute Settlement

The concept of methodological pluralism[16] raises the question of how an international adjudicator construes their own role or function: are they to be 'law-applying' or 'law-making'? On one end of the spectrum, we may have an adjudicator who adheres to an 'international judicial function'[17] and promotes the development and coherency of international law, without fear of criticisms of 'judicial law-making'.[18] On the other extreme, is an adjudicator who more strictly or solely focuses on solving the individual dispute and may be more deferential to states as the legislators.[19] Consequently, at the heart of adjudicative functions of international tribunals is the question: to what extent should there be restrictions on what courts and tribunals can and should do when faced with uncertainty in international law? Answering this question may depend more on the normative perspective of the adjudicator, ranging from international lawmaking being left in the hands of states[20] to

16 See, for example, Ernst-Ulrich Petersmann, 'Narrating "International Economic Law": Methodological Pluralism and Its Constitutional Limits', HJIL 74 (2014), 763-819; Kristen Hessler, 'Theory, Politics, and Practice: Methodological Pluralism in the Philosophy of Human Rights' in: Reidar Maliks and Johan Karlsson Schaffer (eds), *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice* (Cambridge: Cambridge University Press 2017), 15-32.

17 The international judicial function draws from Hersch Lauterpacht's concept, with some modifications to take account of the development of international law. See Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press 2011); Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford: Oxford University Press 2014); Martti Koskenniemi, 'The Function of Law in the International Community: 75 Years After', BYIL 79 (2009), 353-366.

18 In referring to the term, 'judicial lawmaking', the research does not adopt this as an aspect of positive law, but rather the scholarly concept: Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' in: Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Heidelberg: Springer 2012), 3-33.

19 This could also be termed a 'dispute-oriented' and 'legislator-oriented': '[a]t one extreme is a tribunal that strictly and solely focuses on solving the dispute. Such a tribunal would be interested only in the relationship between the parties to the dispute (a "dispute-oriented" tribunal). At the other extreme is a tribunal that sees its role as comparable to that of a legislator (a "legislator-oriented" tribunal)': Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis', EJIL 19 (2008), 301-364 (307).

20 For example, Fitzmaurice noted that while there may be a greater role (and perhaps need) for lawmaking by the international judiciary, there should not be any lack of predictability as to the law the Court will apply. Certainty of the law is to be imparted by states: Gerald Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today: Second and Final Part of an Abstract (Prepared by the Author) of a Special Report', International Relations 5 (1976), 949-997 (964).

 DOI 10.17104/0044-2348-2022-2-401

dynamic interpretations of law in the hands of the judiciary. In this way, the formal source-based rules in the individual treaties and the design of each dispute settlement mechanism could play a much more limited role in understanding a tribunal's approach to other international law than some treaty-drafters may have desired or anticipated.[21]

For the judicial cooperation[22] responses to fragmentation, a lawmaking function is necessary in systemising international law. Adjudicators have become crucial actors in the design and repair of international dispute settlement in the current defragmentation techniques, resonating with Lauterpacht's view of the creative activity of judges in taking into consideration the 'entirety of international law and the necessities of the international community'.[23] When we consider the approach of WTO and investor-state adjudicators, will we see similarities in lawmaking for defragmentation purposes or restraint in settling the individual disputes? Based on the design of the dispute settlement mechanisms, WTO adjudicators may end up somewhere in the middle with the member-driven character of the WTO system more likely to limit judicial activism.[24] For investor-state adjudicators, the ambiguity of the substantive obligations combined with attempts at creating a coherent (sub)regime of international law, may entail

21 This idea draws on the 'demand-side interpretation space' compared to the 'supply-side interpretation incentives' in the work of Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals' in: Jeffrey L. Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press 2012), 445-474.

22 Cooperation approaches broadly refer to international courts being open to the substantive judgements of other courts and coordinating amongst themselves to reduce fragmentation and increase coherence of international law and the judicial system: Chiara Giorgetti and Mark. A Pollack, 'Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition Among International Courts and Tribunals – Introduction' in: Chiara Giorgetti and Mark Pollack (eds), Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition Among International Courts and Tribunals (Cambridge: Cambridge University Press 2022); see, also Mads Andenas and Eirik Bjorge, 'Introduction: From Fragmentation to Convergence in International Law' in: Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge: Cambridge University Press 2015), 1-36 (2-3); the management approach, whereby international judges have sought to organise proliferation in a 'managerial fashion' also falls within this cooperation approach: Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', EJIL 28 (2017), 13-72.

23 Boisson de Chazournes (n. 22) 15 citing; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933), 319-320.

24 Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press 2003), 152; Ernst-Ulrich Petersmann, 'Between "Member-Driven" WTO Governance and "Constitutional Justice": Judicial Dilemmas in GATT/WTO Dispute Settlement', JIEL 21 (2018), 103-122.

a greater need for judicial lawmaking to ensure the completeness of the IIA, drawing from, and thereby incorporating general international law in this process.[25]

III. Systemic Integration in the Reasoning of WTO and Investor-State Dispute Settlement Mechanisms

Although included in the treaty interpretation process in Article 31 of the Vienna Convention, systemic integration was largely left undiscovered until the International Law Commission (ILC) put the principle at the forefront of its Fragmentation Report. Article 31(3)(c) of the Vienna Convention, providing the 'clearest formal expression of the systemic nature of international law',[26] was considered a necessary tool, even in light of its relatively scarce usage in judicial practice.[27] For the ILC, the principle was essential 'to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or "regime"'.[28] As argued by the ILC, the principle goes further than merely restating the applicability of general international law, but rather 'to take into account the normative environment more widely'.[29] The adjudicator is offered the option of applying a systemic interpretation, taking into account the system of international law, and thereby acts as a bridge between a single rule and the system of international law.[30] The fundamental nature of this principle led McLachlan to not simply describe Article 31(3)(c) as customary international law, but rather as a constitutional norm of the international legal system, a technique of interpretation that permits reference to other rules of international law, enabling

25 See Bruno Simma and Dirk Pulkowski, 'Two Worlds, but Not Apart: International Investment Law and General International Law' in: Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Oxford: Hart Publishing 2015), 410-420; Campbell McLachlan, 'Investment Treaties and General International Law', ICLQ 57 (2008), 361-401.

26 Koskenniemi (n. 1), para. 420; see also, Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Leiden: Brill Nijhoff 2015), 5.

27 Koskenniemi (n. 1), paras 423, 433.

28 Koskenniemi (n. 1), para. 480.

29 Koskenniemi (n. 1), paras 414-415.

30 Merkouris noted that by allowing judges to take into account rules of international law, within the limits prescribed by Article 31(3)(c), what is being achieved is what Klabbers very succinctly described as 'unity in fragmentation': Merkouris (n. 26), 6 and 303; referring to, Jan Klabbers, 'Reluctant Grundnormen: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' in: Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Leiden: Brill Nijhoff 2007), 141-161 (159).

 DOI 10.17104/0044-2348-2022-2-401

the harmonisation of rules and thereby avoiding conflict of norms.[31] Understood in this way, the principle of systemic integration attempts to partially restore the idea of determinacy within international law, an important function of a lawmaking international tribunal.[32]

1. Appeals to a System of International Law: Empirical Observations

A simple empirical assessment of the use of Article 31(3)(c) by the WTO and investor-state dispute settlement mechanisms identifies an important commonality in the use of this interpretation method: Article 31(3)(c) is rarely successfully invoked.[33] Limiting the empirical assessment to disputes where a party or an adjudicator has specifically turned their mind to the Article 31(3)(c) argument, we find only 29 WTO reports (representing 32 instances of 'other' international law)[34] and 42 ISDS awards (representing 46 instances of 'other' international law)[35] out of a total of 402 WTO reports and 499 ISDS awards analysed. This focus on explicit references to Article 31 (3)(c) or systemic integration (or more indirect utilisation of the language of Article 31(3)(c)) does not take into account any inherent application of the principle. Arguably, if the tribunal applies the concept without naming it, the result is still the same, namely the application of other international law in the interpretation of the treaty:

31 Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', ICLQ 54 (2005), 279-320 (280); see, also Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', ICLQ 55 (2006), 281-314 (283).

32 Gleider I. Hernández, 'Interpretation' in: Jorg Kammerhofer and Jean D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press 2014), 317-348 (318).

33 'Invoked' refers to the mention of systemic integration or Article 31(3)(c) by one of the parties to the dispute, or the tribunal *propio moto*. Whether the concept of systemic integration has been invoked, as identified in this section, is based solely on the tribunal award, thereby the tribunal's summary of the parties' arguments relevant to its decision. The empirical assessment does not include analysis of all memorials and written submission documents of the parties, which could have included other references to systemic integration, but which the tribunal did not find necessary to include in its decision.

34 'Other international law' was defined broadly as any international law, rules or principles that is not within the text of the constitutive treaty of the dispute settlement mechanism. The research defined such law in line with the sources of law in Article 38(1) of the Statute of the International Court of Justice. The primary exclusion of what was considered 'other international law' was rules of treaty interpretation.

35 The empirical analysis excludes 27 decisions which solely raised Article 31(3)(c) in the context of the intra-EU objection as such decisions skew the comparability of the two dispute settlement mechanisms.

> 'If […] certain ILC Articles have been "cited as containing similar provisions to those in certain areas of the WTO Agreement" or "cited by way of contrast with the provisions of the WTO Agreement", this evinces that these ILC Articles have been "taken into account" in the sense of Article 31(3)(c) by panels and the Appellate Body in these cases.'[36]

Inherent or implicit systemic integration may still enhance the coherence of substantive international law. However, it cannot enhance the coherence of the methodology of international law.[37] Without referring to the principle directly, the studied dispute settlement mechanisms may, on the one hand, be concealing the uncertainty surrounding systemic integration to avoid criticism in the use of the principle, and, on the other, not contributing to the elucidation of the uncertain aspects of systemic integration. Only direct invocations are capable of meeting a conscious and transparent standard of legal reasoning, which is important to the methodology of international adjudication.[38] Indirect applications may obscure the source of judicial authority or normative preference of the adjudicator and thereby do not meet this standard of legal reasoning. As such, it is necessary in this short paper to consider only the explicit references to systemic integration.

When we breakdown whether systemic integration has been relied on by the dispute settlement mechanisms (Table 1), we see a drastic difference between the two mechanisms: investor-state tribunals are more than twice as likely to accept the other international law on the basis of Article 31(3)(c). In comparison, WTO panel and Appellate Body reports are more likely to reject or not deal with the Article 31(3)(c) argument. The prevalence of occasions that WTO panels or the Appellate Body have determined that it was not necessary to decide or otherwise not deal with the Article 31(3)(c) argument may be partly explainable by the greater reliance on judicial economy in WTO reports.[39] This indicates a potentially greater international judicial function requirement by investor-state adjudicators to overcome the otherwise isolated and vague bilateral investment agreements.

---

36 WTO Appellate Body, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, report of 11 March 2011, WT/DS379/AB/R, para. 313.

37 See discussion in Eirik Bjorge, 'The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation?' in: Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation* (Cambridge: Cambridge University Press 2015), 498-535.

38 See Andreas Paulus, 'International Adjudication' in: Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press 2010), 207-224.

39 See WTO, Appellate Body, *Australia – Measures Affecting the Importation of Salmon*, report of 6 November 1998, WT/DS18/AB/R, para. 233.

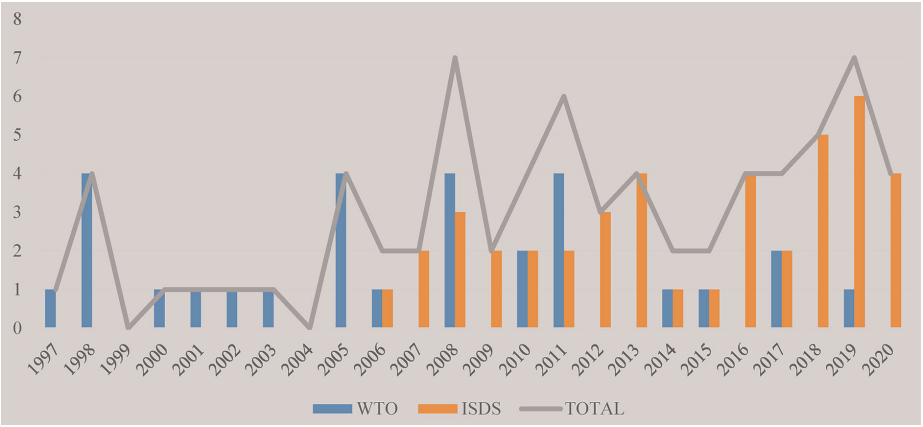
 DOI 10.17104/0044-2348-2022-2-401

Table 1: references to systemic integration

	WTO	**ISDS**
Accepted	8 – 25 %	25 – 54 %
Rejected	11 – 34.3 %	12 – 26 %
Not necessary to decide (or not dealt with)	13 – 40.6 %	9 – 19.5 %

We can also see a difference in the temporal spread of decisions dealing with systemic integration (Figure 1). For the WTO, we can see that panels and the Appellate Body have considered systemic integration on a semi-regular basis, whereas most ISDS decisions are concentrated in the post-2010 period.[40] In fact, no ISDS decision considered the relevance of Article 31(3)(c) prior to 2006. McLachlan credits the 'interplay between the jurisdictional constraints upon the scope of the tribunal's competence and the interpretation of the law to be applied' as a possible explanation for the rising resurgence of Article 31(3)(c).[41] In this way, it may simply be a response to the renewed interest in Article 31(3)(c) after the *Oil Platforms* decision within the defragmentation context.

Figure 1: timeline of systemic integration references



When we compare these results on total number of occasions that other public international law has been raised in these dispute settlement mechanisms, we can see the very small relevance of direct invocation by the parties of, and reliance by, the dispute settlement mechanisms on systemic integra-

40 8 cases prior to 2010, compared to 34 cases post-2010.

41 McLachlan (n. 31), 288.

tion (Table 2). From the standpoint of the formal sources on incorporation of other international law, this is not necessarily problematic as there are other ways in which other public international law could be (and indeed have been) taken into account by the dispute settlement mechanisms. However, it may be problematic if other legal bases relied on by the dispute settlement mechanisms are not in fact appropriate or no legal basis is supplied by the dispute settlement mechanism. The inconsistency in reasoning unravels some of the confidence in the legal correctness of the dispute settlement mechanism's reasoning in this regard.

Table 2: comparison of total instances of other international law compared to systemic integration instances[42]

	WTO		**ISDS**	
	Instances of systemic integration	Instances of other international law	Instances of systemic integration	Instances of other international law
Taken into account	8	121	25	536
Not taken into account or not decided	24	70	21	381
Total	32	191	46	917

The small number of direct invocations of Article 31(3)(c) also makes it difficult to conclude on the extent that systemic integration promotes the coherence of international law. This small number of direct invocations of, and reliance on, Article 31(3)(c) does not clearly indicate a system mind-set of the adjudicators. However, nor does it indicate a rejection of such systemic ideas. Perhaps the small number of direct invocations is an attempt to avoid the difficult uncertainties still surrounding the formulation and limitations of the language of Article 31(3)(c). Regardless, the relatively low number of direct invocations of Article 31(3)(c) could have significant implications for defragmentation. The indirect application of the principle of systemic integration

42 The empirical figures on the total instances of other international law within the reasoning of WTO and investor-state dispute settlement decisions has been taken from the larger doctrinal work: Nicola Strain, *Jurisdiction and Applicable Law in Investor-State and WTO Dispute Settlement: Comparing Consent and Inconsistency in the Application of Other International Law* (dissertation submitted for adjudication at the University of Oslo, 2021, ISSN 1890-2375).

 DOI 10.17104/0044-2348-2022-2-401

could suggest that the dispute settlement mechanisms had an insufficient legal basis for the incorporation of international law. Avoiding the direct reference could be an attempt at avoiding allegations of misapplication of the principle. Nevertheless, application of the principle of systemic integration, either indirectly or without direct reference to the Vienna Convention, would be relevant to identifying an appeal to the system of international law. However, these indirect invocations are unlikely to meet the standard of 'consciously and transparently' applying the judges' own reasoned judgment or contribute to the coherency of the methodology of international adjudication.[43]

2. Methodological Pluralism and the Problem of Systemic Integration

Irrespective of whether the principle is indirectly or directly referred to, the principle may represent as much of a problem for fragmentation as it does a solution. An isolationist methodology, in which a tribunal rejects the application of Article 31(3)(c), could be detrimental to the coherent development of international law,[44] particularly if that reasoning on Article 31(3)(c) perpetuates throughout the (sub)regime. Article 31(3)(c) may also add to the contradictions as there may not be a 'clear and unequivocal' solution to conflicts in relation to the development of international law between various (sub)regimes.[45] Systemic integration is not an exact science. The level of generality with which Article 31(3)(c) has been drafted leaves us with significant uncertainty in how to apply the provision. Despite acknowledging the pivotal role of Article 31(3)(c) for the first time in *Oil Platforms,*[46] the International Court of Justice (ICJ) gave very little guidance as to when and how it should be applied. This is particularly lamentable when we consider the criticisms of the reasoning in the separate opinions of the extensive application of customary international law using Article 31(3)(c).[47] In the regimes of this study, we can identify at least two occasions for concern with adding to the contradictions and dilemmas of international law: the relevance of

43 Paulus (n. 38).

44 See, for example, Baetens' conclusion on the application of Article 31(3)(c) in two different legal regimes: Freya Baetens, 'Muddling the Waters of Treaty Interpretation? Relevant Rules of International Law in the MOX Plant OSPAR Arbitration and EC – Biotech Case', Nord. J. Int'l L. 77 (2008), 197-216.

45 Paulus (n. 38), 222.

46 'The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court': ICJ, *Oil Platforms* (Islamic Republic of Iran v United States of America), judgement of 6 November 2003, ICJ Reports 161, 182-183.

47 See, the separate and dissenting opinions of Judge Higgins and Judge Buergenthal. See, further, McLachlan (n. 31), 309.

environmental agreements in the WTO and the customary defence of necessity in investment arbitration.

US – Shrimp and *EC – Biotech* take competing approaches to the application of environmental agreements through the prism of Article 31(3)(c). In *US – Shrimp*, the Appellate Body expressly turned to international environmental agreements to interpret parts of the General Agreement on Tariffs and Trade (GATT) exception on 'exhaustible natural resources' (Article XX(g)). However, the Appellate Body did not refer to Article 31(3)(c) in undertaking its now famous evolutionary interpretation.[48] Rather, the express reference to Article 31(3)(c) applied to the principle of good faith in interpreting the chapeau of Article XX. In a commonly cited passage, the Appellate Body noted that it was their task 'to interpret the language of the chapeau, seeking additional interpretive guidance, as appropriate from the general principles of international law',[49] with a footnote reference to Article 31(3)(c).[50] Later, in reasoning the evolutionary interpretation of 'exhaustible natural resources', the Appellate Body referred to such instruments as United Nations Convention on the Law of the Sea (UNCLOS),[51] the Rio Declaration,[52] the Convention on Biological Diversity[53] and the Convention on the Conservation of Migratory Species of Wild Animals.[54] These instruments which the Appellate Body considered were 'recent acknowledgment by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources' supported its determination that 'it is too late in the day to suppose that Article XX(g) […] may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources'.[55]

48 WTO, Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, report of 12 October 1998, WT/DS58/AB/R, paras 129-130. On evolutionary interpretation in WTO disputes, see Graham Cook, 'The Illusion of "Evolutionary Interpretation" in WTO Dispute Settlement' in: Georges Abi-Saab, Gabrielle Marceau and Clément Marquet (eds), *Evolutionary Interpretation and International Law* (Oxford: Hart 2019), 181-194; Gabrielle Marceau, 'Evolutive Interpretation by the WTO Adjudicator', JIEL 21 (2018), 791-813.

49 *US – Shrimp* (n. 48), para. 158.

50 *US – Shrimp* (n. 48), fn. 157.

51 The Appellate Body referred to Article 56 on defining the jurisdictional rights of coastal states, and Articles 61-62 on the conservation of living resources: United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), 1833 UNTS 397.

52 The Appellate Body referred to Agenda 21 as speaking broadly of 'natural resources': Agenda 21, adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/26/Rev.1.

53 The Appellate Body referred to the concept of 'biological resources' in this Convention: Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), 1760 UNTS 79.

54 The Appellate Body referred to the Resolution on Assistance to Developing Countries reciting 'living natural resources': Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979), 19 ILM 11, 15.

55 *US – Shrimp* (n. 48), para. 131.

 DOI 10.17104/0044-2348-2022-2-401

As the Appellate Body did not directly refer to Article 31(3)(c) in this interpretative exercise, it is not surprising that the Appellate Body did not undertake an examination of the elements of Article 31(3)(c), even in light of its acknowledgement that parties to the dispute had not ratified all of the international instruments.[56] This avoidance of referring to Article 31(3)(c) perhaps reflected a pragmatic approach to questions of treaty interpretation and systemic integration.

The Panel in the Article 21.5 compliance proceedings attempted to overcome the implicit application of Article 31(3)(c) by the Appellate Body. The Panel began by explicitly referring to Article 31(3)(c) when addressing the Appellate Body's reference to the multilateral environmental agreements,[57] something which the Appellate Body did not do itself. Then, the Panel attempted to rectify the Appellate Body's potential error in its interpretation by noting that all parties to the dispute have accepted or committed to comply with the international instruments, with the exception of the Convention on the Conservation of Migratory Species of Wild Animals.[58] The Panel did not indicate whether this exception did (or should) have any impact on its interpretative reasoning. In this section, the Panel was dealing with a different section of the Article XX analysis, the line of equilibrium, in which the Appellate Body also referred to multilateral environmental agreements, rather than the interpretation of 'exhaustible natural resources'. However, the Article 31(3)(c) reference by the Panel is still highly pertinent since the same multilateral agreements were the subject of both parts of the Appellate Body's legal reasoning. In particular, it suggests a more flexible interpretation of Article 31(3)(c) that does not require all parties to the dispute to be parties to the treaty being relied on for interpretation.

This analysis of Article 31(3)(c) stands in direct contrast with the approach of a later panel in *EC – Biotech*. The Panel set out in detail the elements of Article 31(3)(c) and considered the textual meaning of 'rules of international law'. The Panel's interpretation of the elements of Article 31(3)(c) lead it to the conclusion that the 'rules of international law applicable in the relations between the parties' requires the consideration of rules which are applicable in the relations between *all* parties to the treaty which is being interpreted. In the Panel's view, this enhances the consistency of the appli-

56 *US – Shrimp* (n. 48), fn. 110.

57 WTO, Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 215 by Malaysia*, report of 15 June 2001, WT/DS58/RW, para. 5.57.

58 *US – Shrimp – Recourse Malaysia* (n. 57), referring to para. 168 of the Appellate Body report. Together with the preamble of the WTO Agreement and the Marrakesh Decision establishing the Committee on Trade and Environment, the international instruments influenced the positioning of the line of equilibrium towards multilateral solutions: see paras 5.51-5.58.

cable rules and contributes to the avoidance of conflict between the relevant rules.[59] The Convention on Biological Diversity was again an interpretative tool before the Panel and, based on its earlier interpretation, the Panel rejected the application of this Convention under the Article 31(3)(c) interpretative method since the United States (US) was not a party to the Convention.[60] As the rules of international law in this case were not argued by all parties to the dispute to be relevant to interpretation of the WTO agreements, the Panel did not need to take a position on whether this would change its analysis.[61]

After finding that it was not required to take into account the Convention (or the precautionary principle as a general principle or customary law), the Panel examined whether other rules of international law could be used in interpretation 'even if these rules are not applicable in relations between the WTO Members and thus do not fall within the category of rules which is at issue in Article 31(3)(c)'.[62] The Panel responded to the Appellate Body's reference to conventions that were not applicable to all disputing parties by noting that this mere fact 'does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty to be interpreted'.[63] The Panel referred more generally to the Appellate Body's use of the international instruments as informative aids and noted that the Appellate Body did not suggest it was doing so under Article 31(3)(c) requirements.[64] The Panel then found it not 'necessary or appropriate' to rely on the provisions of the Convention in interpreting the WTO agreements.[65] Despite the Panel interpreting the Appellate Body's use of the international instruments as not falling within the Article 31(3)(c) process, scholarly commentary still cites the Appellate Body's interpretation of 'exhaustible natural resources' as an example of the application of systemic integration.[66]

For ISDS tribunals, the Argentine financial crisis disputes have been the subject of extensive criticism for the inconsistent approach to the state of

59 WTO, Panel, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 215 of the DSU by the United States*, report of 19 May 2008, WT/DS27/RW/USA, para. 7.70.

60 *EC – Bananas (Art. 215)* (n. 59), para. 7.74.

61 *EC – Bananas (Art. 215)* (n. 59), para. 7.72.

62 WTO, Panel, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, report of 29 September 2006, WT/DS291/R; WT/DS292/R; WT/DS293/R, para. 7.90.

63 *EC – Bananas (Art. 215)* (n. 59), para. 7.94.

64 *EC – Bananas (Art. 215)* (n. 59), para. 7.94, fn. 271. The Panel noted the Appellate Body had not even mentioned Article 31(3)(c).

65 *EC – Biotech* (n.62), para. 7.95.

66 See, for example, McLachlan (n. 31), 302; Merkouris (n. 26), 47.

necessity defence in the US – Argentina IIA.[67] The development of the jurisprudence in this series of cases as they progressed through multiple annulment proceedings settled into a *lex specialis* view of the relationship between the customary and treaty defence.[68] Yet, the cases still illustrate an inconsistent approach to the extent to which the customary plea can be used to fill gaps in the IIA language. This question has been clearly played out in the inconsistent approach to the application of Article 31(3)(c) in the *Mobil Exploration* and *El Paso* decisions in determining whether a condition of non-contribution was included in the IIA provision.[69]

In *El Paso*, the tribunal referred to the Iran-US Claims Tribunal's reasoning in the *Amoco* case for the fact that, even though a treaty is *lex specialis*, it does not mean that customary international law is not relevant.[70] Relying on this, the tribunal found that Article 25(2) of the ILC Articles was a rule of general international law, applicable between the parties, which, as such, could be used to interpret the IIA provision pursuant to Article 31(3)(c).[71] This meant that the IIA provision must be interpreted as limiting the invocation of necessity where the party has not created or substantially contributed to it.[72] The *Mobil Exploration* tribunal took the same approach, which was

67 See, for example, *CMS Gas Transmission v. Argentina*, award of 12 May 2005, case no. ARB/01/8; *Enron Creditors Recovery Corp and Ponderosa Assets, LP v. Argentine Republic*, award of 22 May 2007, case no. ARB/01/3.

68 See Jürgen Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration', ICSID Review 25 (2010), 200-217.

69 The non-contribution requirement is reflected in Article 25(2) of the ILC Articles which states that 'necessity may not be overlooked by a State as a ground for precluding wrongfulness if: […] (b) the State has contributed to the situation of necessity': Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission at its fifty-third session, 2001).

70 ICSID, *El Paso Energy International Company v. The Argentine Republic*, award of 31 October 2011, case no. ARB/03/15, para. 616; referring to *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran and others* (1987) 15 Iran-US CTR 189, para. 112 where the tribunal stated: '[a]s a lex specialis in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary international law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.'

71 *El Paso Energy* (n. 70), para. 621.

72 *El Paso Energy* (n. 70), para. 624. Argentina appealed this aspect of the tribunal's decision for failure to state reasons. The Annulment Committee dismissed Argentina's application in its entirety and did not comment on the appropriateness of the tribunal's approach to Article 31(3)(c): *El Paso Energy International Company v The Argentine Republic* (ICSID Case No ARB/03/15), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 22 September 2014 [248, 254].

subject to strong dissent by Arbitrator Brotons, who considered the majority had misunderstood the *raison d'être* of Article 31(3)(c):

> '[…] when requiring that interpretation takes into account, together with the context, "any relevant rules of international law applicable in the relations between the parties" attempts to save the unity of international law, ensure the observance of its imperative rules and consistency amongst different international obligations, without interfering with the interpretation of particular rules in accordance with the interpretative canon already established. The "state of necessity" rule is certainly not pertinent to the interpretation of a rule such as Article XI of the Treaty, which is very different conceptually.'[73]

The Annulment Committee in *Mobil Exploration* confirmed the reasoning of Arbitrator Brotons, noting that Article 31(3)(c) only has a role to play where the treaty is unclear or ambiguous and, therefore, merits interpretation.[74] While the Annulment Committee agreed with the tribunal and the *El Paso* tribunal that customary law can be used to fill the gaps in a treaty, the Annulment Committee found that the tribunal actually applied the customary defence 'under the guise' of an interpretation of a specific phrase of the IIA.[75]

In setting out this uncertainty and inconsistency, the methodological pluralism of the tribunals aligns with two different interpretative sub-functions of this principle. Kammerhofer, drawing from Koskenniemi's duality of apology and utopia in the justification for the use of systemic integration,[76] refers to 'apology' as the recourse to party intentions, while 'utopia' is international law as a coherent system. The recourse to party intentions in the 'apology' sub-function, symbolic of a consent-based approach, sets out the proper limit of systemic integration in uncovering party intentions, thereby a more 'law-applying' adjudicative function. Comparatively, a systemic view, or 'utopia', is not grounded in party reference but rather a desire for substantive coherence between different norms, requiring a greater 'lawmaking' function.

All this demonstrates that systemic integration is a complex principle. The principle could play an important role in defragmentation and connecting

---

73 ICSID, *Mobil Exploration and Development v Argentine Republic*, Decision on Jurisdiction and Liability of 10 April 2013, case no. ARB/04/16, separate opinion of Arbitrator Brotons, para. 26.

74 ICSID, *Mobil Exploration and Development v. Argentine Republic*, Decision on Annulment of 8 May 2019, case no. ARB/04/16, para. 93.

75 *Mobil Exploration* (Annulment) (n. 74), paras 96-97.

76 Jörg Kammerhofer, *International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources* (Cambridge: Cambridge University Press 2021), chap. 4; referring to Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press 2005).

 DOI 10.17104/0044-2348-2022-2-401

legal regimes and norms. However, this is not to say that systemic integration is without limits. International tribunals should be cautious about how far systemic integration is desirable, as illustrated in the *Oil Platforms* decision and to be continued in the next section. The uncertainty surrounding the principle can do as much damage to substantive fragmentation, demonstrated in its underutilisation and the inconsistent approaches to its application. This necessitates a greater understanding of the principle and the underlying normative concerns bound up in its application.

IV. Systemic Integration and Jurisdiction: a Complicated Relationship?

The existence of uncertainty and inconsistency surrounding systemic integration is highly pertinent for our enquiry on the relationship between consent and systemic integration. To what extent are these uncertainties affecting how tribunals approach systemic integration more broadly? Are the tribunals leveraging the uncertainty in their application of 'other' public international law? When we consider these questions in the context of defragmentation, the uncertainty could be leveraged in opposite directions, depending on the systemic values of the adjudicator. The uncertainty could provide adequate discretionary room for adjudicators to argue for the application of Article 31(3)(c), thereby contributing to the systemic view of international law and breaking down the siloes between regimes. Conversely, the uncertainty could be used as an excuse not to apply the principle, potentially through taking a restrictive interpretation of the particular wording of Article 31(3)(c). What we find is that both dispute settlement mechanisms struggle with the relationship between jurisdiction and interpretation. Several reports and awards of these dispute settlement mechanisms highlight the fine line between interpretation and application of 'other' international law, linking back to the jurisdictional limits of the dispute settlement mechanism in the process and a limitation of the adjudicative function to law-applying.

1. Relationship Between Jurisdiction and Systemic Integration: ISDS

Article 31(3)(c) has been invoked in ISDS to bridge the gap between investment law and other normative frameworks, albeit with varying levels of success. In the intra-EU objection to the jurisdiction of investor-state tribu-

nals, systemic integration has been one of the alternative arguments raised by EU states, but such attempts have been largely unsuccessful on the basis of consent to jurisdiction.[77] After quoting the *Vattenfall* tribunal that 'it is not the proper role of [Article 31(3)(c)] to rewrite the treaty being interpreted',[78] the tribunal in *Eskosol* rejected such a role for this principle:

> 'And yet this would be the natural result of the Commission's arguments, by overriding as between some ECT Contracting Parties, but not others, the "unconditional consent" to international arbitration clearly reflected in ECT Article 26 (3). The Tribunal rejects the notion that VCLT Article 31(3)(c) can be used in this way.'[79]

Here, the tribunal is making a clear comment on the relationship between Article 31(3)(c) and jurisdiction, maintaining the sanctity of the consensual nature of international adjudication. As such, different sources of international law must be treated with caution if it may affect the nature of jurisdictional consent. Although not directly criticising the use of Article 31(3)(c), the number of ISDS tribunals avoiding the use of Article 31(3)(c) may also support this general concern with extending systemic integration.

In the application of human rights norms, there is diverging treatment of systemic integration based on whether those norms are applicable as a potential defence to the investment claim or as part of the state's obligation to the foreign investor. For example, in *Tulip Real Estate*, the tribunal interpreted the fundamental rule of procedure within the ICSID Convention grounds of annulment by referring to the right to fair trial in human rights.[80] *Urbaser* similarly accepted the possibility of taking into account human rights using Article 31(3)(c) in recognizing the human right to water, yet also demonstrated the limitation of this interpretative technique. While recognizing the right, the tribunal found it did not extend to incurring obligations on investors. This highlights the necessary distinction between *reading in* substantive

77 Johann Robert Basedow, 'The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration', JIEL 23 (2020), 271-292; David Restrepo Amariles, Amir Ardelan Farhadi and Arnaud Van Waeyenberge, 'Reconciling International Investment Law and European Union Law in the Wake of Achmea' ICLQ 69 (2020), 907-943.

78 ICSID, *Vattenfall AB and others v. Federal Republic of Germany (II)*, Decision on the Achmea Issue of 31 August 2018, case no. ARB/12/12, para. 154.

79 ICSID, *Eskosol S.pA in liquidazione v Italian Republic*, Decision on Termination Request and Intra-EU Objection of 7 May 2019, case no. ARB/15/50, para. 126.

80 ICSID, *Tulip Real Estate v. Turkey*, Decision on Annulment of 30 December 2015, case no. ARB/11/28, paras 86-92. The Annulment Committee was careful to note that it was not adding in obligations extraneous to the ICSID Convention and was merely limiting itself to treaty interpretation.

obligations, which taps into the scope of the jurisdictional authority of a tribunal, compared to *interpreting* treaty obligations.[81]

A stricter approach to systemic interpretation can be found in the *Grand River* and *South American Silver* disputes, whose tribunals emphasised their jurisdictional limitations. The tribunal in *Grand River* was encouraged to take a broad understanding of the scope of investment, urged by the claimant to bring into the process of interpretation human rights norms and customary rules relevant to indigenous peoples.[82] The tribunal referred to its limited jurisdiction:

> 'The Tribunal understands the obligations "to take into account" other rules of international law to require it to respect the Vienna Convention's rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA.'[83]

The tribunal ultimately managed to avoid the difficult question to what extent a possible customary rule may affect the minimum standard of treatment under Article 1105 of NAFTA as the tribunal could dismiss the argument on the basis that the possible customary rules submitted by the claimant did not assist the individual investor in the dispute.[84]

In *South American Silver Ltd v Bolivia*, also concerning indigenous rights, the claimant contended that the applicable law in an investment dispute is the investment treaty, as primary source of law and *lex specialis*, supplemented by general principles of international law, as needed.[85] Bolivia argued that the tribunal was vested with broad discretion as to applicable law and that applicable law in this dispute should be interpreted in light of the sources of international and domestic law that guarantee protection of the rights of the indigenous communities affected by the investment project.[86] Bolivia specifically relied on

81 ICSID, *Urbaser SA v. Argentine Republic*, award of 8 December 2016, case no. ARB/07/26, paras 1200-1210; similarly, see ICSID, *The Rompetrol Group NV v. Romania*, award of 6 May 2013, case no. ARB/06/3, paras 169 ff., where the tribunal considered its limited jurisdiction meant it could not consider a breach of fair trial provisions in the ECHR but could interpret the IIA provisions in light of the ECHR. Although the tribunal did not provide a legal basis for its reference to the ECHR in interpretation.

82 UNCITRAL, *Grand River Enterprises Six Nations Ltd v. United States of America* (ad hoc), award of 12 January 2011, para. 66.

83 *Grand River* (n. 82), para. 71.

84 *Grand River* (n. 82), paras 210-213.

85 PCA, *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, award of 22 November 2018, case no. 2013-15), para. 186. In the relevant IIA, there was no applicable law clause.

86 *South American Silver Limited* (n. 85), para. 194.

systemic integration of the investment treaty. The tribunal cautioned against relying on the ICJ's decision in *Oil Platforms*, as Bolivia sought, noting difficulties arise from applying Article 31(3)(c) in matters of jurisdiction and normative conflict. The tribunal instead noted that a court's jurisdiction cannot be extended to cover other treaties via Article 31(3)(c), nor could the treaties be brought through the 'back door' if States have not consented to jurisdiction.[87] Additionally, the applicable law cannot be altered through rules of treaty interpretation. As a result, the tribunal considered that the principle of systemic interpretation 'must be applied in harmony with the rest of the provisions of the same articles and cautiously, in order to prevent the tribunal from exceeding its jurisdiction and applying rules to the dispute which the Parties have not agreed to.'[88] The tribunal went on to reject Bolivia's argument that certain international rules on human rights protection and Bolivian national law were applicable.[89] In its decision, the tribunal emphasised the consent of the parties to both jurisdiction and the application of rules.

2. Relationship Between Jurisdiction and Systemic Integration: WTO Disputes

Similarly, panels in WTO disputes have drawn comparable concerns on the fine line between interpretation and application, which we can link back to this concern on the relationship between jurisdiction and interpretation. In *Argentina – Poultry*, Argentina attempted to argue that MERCOSUR rulings were part of the normative framework to be taken into account by the panel.[90] The Panel rejected the relevance of MERCOSUR rulings under Article 31(3)(c). The Panel considered that Argentina had not relied on any statement or finding by the MERCOSUR Tribunal to suggest a particular interpretation of WTO agreements. Rather, the Panel determined that Argentina was arguing 'that the earlier MERCOSUR Tribunal ruling requires [the Panel] to rule in a particular way'.[91] The Panel noted it was not bound to follow rulings in adopted WTO panels, let alone rulings of non-WTO dispute settlement bodies. By rejecting Argentina's argument in this way, the

87 *South American Silver Limited* (n. 85), 215.

88 *South American Silver Limited* (n. 85), para. 216.

89 *South American Silver Limited* (n. 85), paras 217-218.

90 WTO, Panel, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, report of 22 April 2003, WT/DS241/R, paras 7.18, 7.21. Argentina also argued that Brazil's conduct in bringing the dispute in different fora was contrary to the principle of good faith, which warranted invocation of the principle of estoppel. But Argentina did not invoke Article 31(3)(c) in relation to these general principles.

91 *Anti-Dumping Duties* (n. 90), para. 7.41.

 DOI 10.17104/0044-2348-2022-2-401

Panel chose not to reject the application of Article 31(3)(c) on the basis of the requirements of the provision. For example, the Panel could have considered that MERCOSUR rulings were not 'applicable between the parties', as *EC – Biotech* did. Instead, the Panel took a more principled approach on its judicial authority and the nature of Article 31(3)(c).

The *EC – Large Civil Aircraft* Panel took an almost identical approach. The temporal scope of the SCM Agreement was questioned on the basis of a bilateral agreement between the EC and the US. An alternative argument of the EC on the relevance of the bilateral agreement was through the gateway of Article 31(3)(c). The Panel again criticised the so-called interpretation argument since the EC failed to indicate how the bilateral agreement should influence interpretation of the actual terms of the SCM Agreement:

> 'In reality, this is an argument that a particular group of measures… should be excluded from the disciplines of the SCM Agreement based on the 1992 Agreement, rather than an argument about the interpretation of provisions of the SCM Agreement, or of specific terms within those provisions.'[92]

The panels in these WTO disputes do not go as far as the tribunal in the *Eskosol* award, with a clear emphasis on the importance of the consensual nature of international adjudication. Yet, we can read deeper into the panels' aversion to ruling in a particular way, suggesting the tension between consent and reference to 'other' international law rules elucidated by Judge Buergenthal's separate opinion in *Oil Platforms*.[93]

V. Conclusion

The preceding analysis only touches the surface of the use of systemic integration and Article 31(3)(c) in disputes before the WTO and investor-state dispute settlement mechanisms. Yet, the handful of cases considered elucidate important questions concerning how widely other law should be taken into account and what 'taking into account' really means. The 'easy' or clear cases of *South American Silver, Grand River* and *EC – Large Civil Aircraft* in which the claimant or respondent are seeking to use Article 31(3)(c) to bring in other international agreements beyond interpretative powers exemplify the limitations of a dispute settlement mechanism's jurisdiction. It

92 WTO, Panel, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, report of 30 June 2010, WT/DS316/R. para. 7.99.

93 *Oil Platforms* (n. 46) 279, who noted that the ICJ's decision 'conflict[s] with the consensual basis' of jurisdiction and 'would jeopardize the willingness of States to accept the [ICJ's] jurisdiction'.

is the borderline cases on interpretation or application of law where dispute settlement mechanisms find themselves in murky waters if we do not clearly delineate the impact of a limited jurisdiction on interpretation and applicable law powers, as illuminated by the *Mobil Exploration* and *El Paso* inconsistency. The normative pluralism of systemic integration, apology of party intentions and utopia of coherence, are not elucidated in borderline cases and the legal reasoning of the dispute settlement mechanisms should seek to provide much more clarity.

As a legal interpretation method, systemic integration can fall within a positivist view of source material, while also satisfying the normative preference for defragmentation and coherence of a systemic international legal order. However, the inconsistency exhibited in the WTO and investor-state dispute settlement mechanisms' reasoning suggests the need to methodologically conceptualise this principle. A first step is to cognize the appropriate balance against the limitations of consent to jurisdiction. The blurry edges around concepts of systemic integration and jurisdiction create space for adjudicators to expand or restrict their use. How these blurry edges are utilised by adjudicators is potentially impacted by their view of their judicial function and preconceptions of how international legal regimes should interact.

Is it possible to balance consent and the international judicial function in general or in particular circumstances? The limited use of the principle of systemic integration, a systemic ideal within a legal rule, raises concern that adjudicators in trade and investment disputes are yet to find an appropriate balance between the two often competing theoretical considerations of defragmentation and legal positivism. More importantly, the inconsistency and lack of specific legal authority often raised in the WTO and investor-state dispute settlement mechanism decisions highlights the need to bridge the gap, both theoretically and doctrinally, in understanding how systemic ideals fit within legal rules. While not espousing a strict legal positivist approach to systemic integration, which could arguably limit such an important principle redundant, bringing some level of positivism back to such discussions could reduce methodological pluralism through reaffirming legal sources and the limited jurisdiction of dispute settlement mechanisms.

 DOI 10.17104/0044-2348-2022-2-401