REFLECTIONS ON THE COGENCY OF FRAGMENTATION:
STATUTES OF LIMITATION AND “CONTINUING VIOLATIONS” IN INVESTMENT AND HUMAN RIGHTS LAW

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Of late, there has been considerable discussion of the so-called problem of fragmentation in international law; the term itself implies that differential treatment is pathological and resonates with normative legal theory which tends to focus on consistency of rule formulations. We propose to question some of the assumptions of those who have expressed concerns about fragmented treatments in different sectors of international law. Our subject will be statutes of limitation in international agreements and inconsistencies in the application of the judicial invention of the concept of “continuing violations” as a means of circumventing the limitations which time-bars were designed to impose on the jurisdiction of third-party decisionmakers. We are happy to have the opportunity to reflect on this aspect of fragmentation in a publication dedicated to our dear friend, Rüdiger Wolfrum, whose work in these and other areas has so much enriched international law.

A. Introduction

Governments operate within and must also manage complex legal systems which serve, among their other functions, as critical girders for national political economies. The networks of expectations which their legal systems establish and sustain are relied upon by citizens as well as by aliens who choose to enter into or engage those systems. One of the sources of those networks of expectations is now to be found in the increasing number of agreements with other states for the benefit of third parties, whether they be nationals or aliens, and especially agreements which include commitments to resort to third-party decision. Such agreements, assigning, as they do, decisional power to external

institutions, have the potential of affecting—sometimes significantly—
internal political and economic arrangements. Hence they are carefully
crafted by lawyers on all sides so that all the relevant parties, both
the governments who are assuming the obligations and the class of
private parties whose members are entitled to benefit from them,
may know precisely to whom they apply, to what they apply and when
they apply.

The extent of the submission to the jurisdiction of the third-
party decision makers who are empowered by these agreements is,
thus, classically analyzed in terms of the material scope of an agree-
ment (jurisdiction ratione materiae), the personal reach of an
agreement (jurisdiction ratione personae) and the temporal extent of
an agreement (jurisdiction ratione temporis). International tribunals
are bound by law and honor to faithfully implement all the jurisdic-
tional arrangements which parties establish with great care, lest their
decisions exceed the jurisdiction assigned to them, for which trans-
gression their decisions may be annulled.

Investment treaties and human rights treaties are, both, examples of
treaties in favorem tertii. Though part of the same genre, they approach
the “when they apply” question quite differently. The difference in
approach is especially striking in issues of statutes of limitations and
their relation to the category of events that are referred to as “continu-
ing violations.”

B. INTERTEMPORAL DIMENSIONS OF INVESTMENT LAW

In the area of international investment law, the “when they apply”
question—or jurisdiction ratione temporis—is an artifact which is used
to implement many policies besides the comparatively simple question
of when the remit of an agreement begins to run and when it ends.
Because investment agreements are designed to encourage direct for-
eign investors to assume risks they might otherwise eschew, the “when
they end” issue is a matter of acute sensitivity. Treaties may be
denounced by a self-executing political decision but sunk capital—the
characteristic feature of much direct foreign investment—cannot simply
be picked up and carted home. Hence many investment treaties have
what are commonly referred to as “tails.” The Energy Charter Treaty,
for example, provides in Article 47 on withdrawal:

(1) At any time after five years from the date on which this Treaty has
entered into force for a Contracting Party, that Contracting Party